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APPENDIX

Supreme Court, U.S.
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Supreme Court of the United States

OCTOBER TERM, 1970

No. 573

CLAUDE R. KIRK, JR., ET AL.,

Appellants,

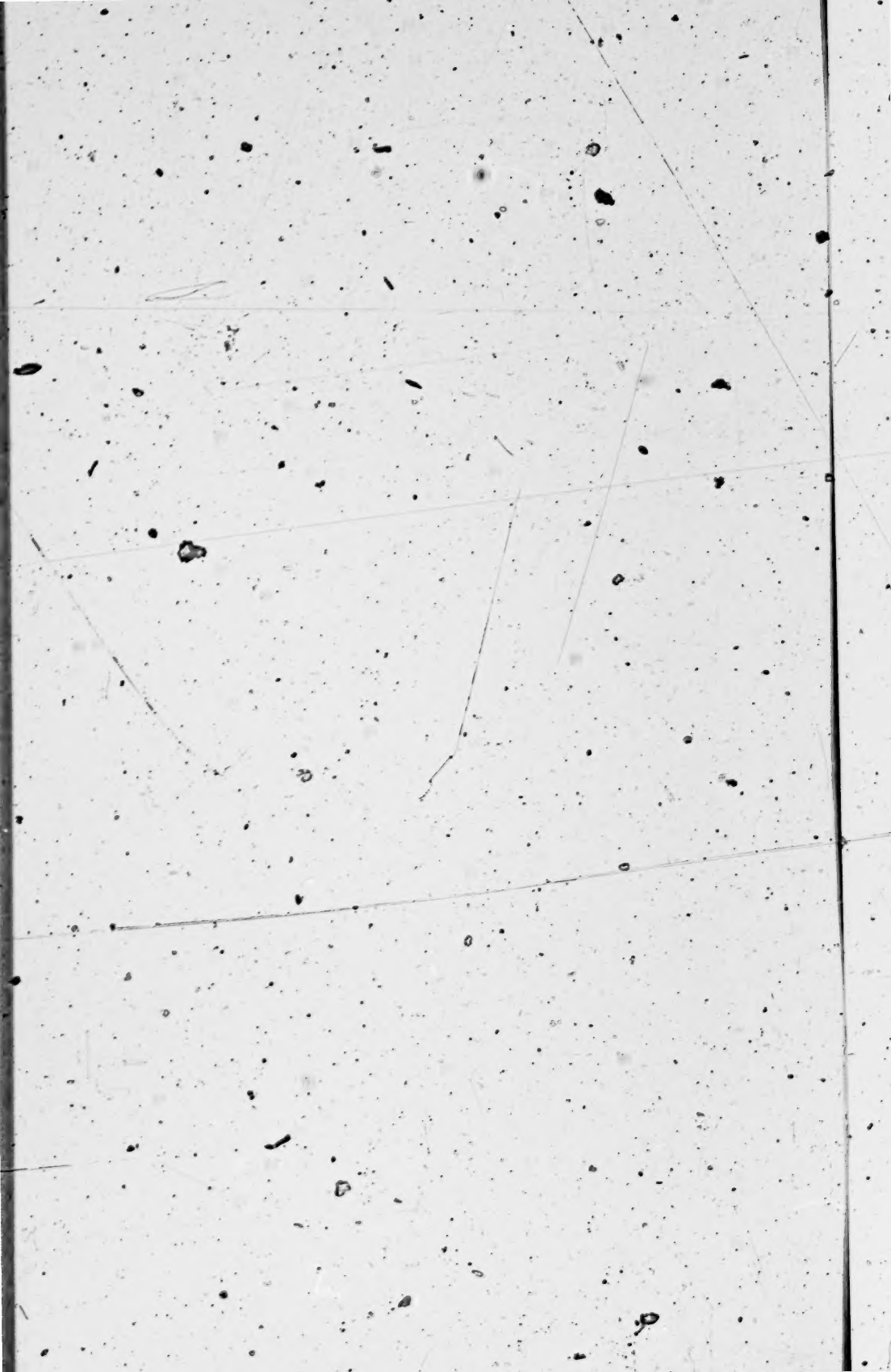
—v.—

ROBERT H. HARGRAVE, ET AL.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

JURISDICTIONAL STATEMENT FILED AUGUST 21, 1970
PROBABLE JURISDICTION NOTED NOVEMBER 9, 1970



IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 573

CLAUDE R. KIRK, JR., Governor, State of Florida, RAY C. OSBORNE, Lieutenant Governor, State of Florida, TOM ADAMS, Secretary of State, State of Florida, EARL FAIRCLOTH, Attorney General, State of Florida, FRED O. DICKINSON, JR., Comptroller, State of Florida, BROWARD WILLIAMS, Treasurer, State of Florida, FLOYD T. CHRISTIAN, Commissioner of Education, State of Florida, and DOYLE CONNER, Commissioner of Agriculture, State of Florida,

Appellants.

v.

ROBERT H. HARGRAVE, JAMES EWING BRADY, NANCY TIMBROOK, DEITH BRIGHT, DEAN ARNOLD, BETTY BATTY, VERA LEMON, ANN TILLMAN, RAYMOND GRANT, BILLY BARLOW, DOROTHY McLEAN, C. LARRY BROWN, JUNE PAGE, MILDRED DUNLAP, BENJAMIN J. CRAIN, JR., MARGARET IVERSON, JOHN FRANK BLUDWORTH, JUNE HARGRAVE by her next friend Robert H. Hargrave, PATRICIA BRADY by her next friend James Ewing Brady, ANITA TIMBROOK by her next friend Nancy Timbrook, MICHAEL BRIGHT by his next friend Keith Bright, HAL ARNOLD by his next friend Dean Arnold, GREG BATTY by his next friend Betty Batty, RALPH LEMON, JR. by his next friend Vera Lemon, DONNA TILLMAN by her next friend Ann Tillman, LINDA GRANT by her

next friend Raymond Grant, PHOEBE BARLOW by her next friend Bill Barlow, LINDA MCLEAN by her next friend Dorothy J. McLean, TERRI BROWN by her next friend C. Larry Brown, STEVEN PAGE by his next friend June Page, JOLENE DUNLAP by her next friend Mildred Dunlap, CAROL CRAIN by her next friend Benjamin J. Crain, Jr., CHRISTIAN IVERSON by his next friend Margaret Iverson, and MARGARET BLUDWORTH by her next friend John Frank Bludworth, individually and on behalf of all others similarly situated,

Appellees.

On Appeal from the United States District Court for the Middle District of Florida

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

CLAUDE R. KIRK, JR., et al.,
Appellants,

v. Civ. Action No. 68-463T

ROBERT H. HARGRAVE, et al.,
Appellees.

DOCKET ENTRIES

1968

Oct. 31 - Complaint filed.

Oct. 31 - Plaintiffs' motion to convene a three-judge court.

Nov. 22 - Motion of Defendants to dismiss.

Nov. 26 - Hearing on Plaintiffs' motion to convene a three-judge court; and on motion of Defendants to dismiss.

Nov. 26 - Arguments by counsel to the court.

Nov. 26 - Court's ruling that Rule 23, class suit, is not applicable.

Nov. 26 - Defendants' motion to dismiss complaint granted; court ordered dismissal with prejudice.

Nov. 29 - Order granting Defendants' motion to dismiss for lack of jurisdiction, etc.

Dec. 9 - Motion by Plaintiffs for clarification and amendment of order.

Dec. 13 - Defendants' motion to dismiss complaint granted and action dismissed with prejudice for reasons set forth; Plaintiffs' motion for three-judge court denied.

Dec. 18 - Report of argument upon Defendants' motion to dismiss complaint.

Dec. 19 - Plaintiffs' notice of appeal filed.

1969

July 7 - Copy of judgment from USCA reversing and remanding to said District Court with directions to take appropriate steps re. 3-judge court, and copy of bill of costs.

July 23 - Signed copy by Hon. John R. Brown, Chief Judge, 5th Cir., re. 3-judge court.

Sept. 22 - Letter from Plaintiffs' counsel re. notice of intent to file amended complaint.

Oct. 3 - Amended complaint filed; attached Exhibits A-C; request for 3-judge court.

Dec. 22 - Defendants' answer to amended complaint.

1970

Jan. 8 - Affidavit of Hershel Shanks, with attachments.

Jan. 8 - Plaintiffs' motion for summary judgment.

Jan. 9 - Affidavit of Lee Young, with attachments.

Jan. 19 - Motion for summary judgment of Defendants.

May 8 - Order granting Plaintiffs' motion for summary judgment; Defendants enjoined from withholding MFP funds from any county by virtue of provisions of such Act.

June 4 - Notice of appeal to Supreme Court by State Board of Education.

[Caption deleted in printing]

AMENDED COMPLAINT

1. Jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. Sect. 1331, 1343, 2201-2202, and 2281; 42 U.S.C. Sect. 1983 and under the Fourteenth Amendment to the Constitution of the United States. The matter in controversy exceeds, exclusive of interests and costs, the sum of Ten Thousand Dollars ($10,000.00).

2. This is a class action pursuant to Rules 23 and 57 of the Federal Rules of Civil Procedure which challenges the validity of Section 23 of Chapter 68-18, Acts of the Florida Legislature (1968) on the basis of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, and seeks to enjoin defendants from enforcing said statute.

3. Each of the plaintiffs is a resident of Florida and of the County indicated in the second column below and is either a freeholder and parent or a student in the public schools of Florida as indicated in the third column below:

Name	*County of Residence*	*Freeholder and Parent or Student*
Robert H. Hargrave	Alachua	Freeholder/Parent
James Ewing Brady	Brevard	Freeholder/Parent
Nancy Timbrook	Broward	Freeholder/Parent
Keith Bright	Collier	Freeholder/Parent
Dean Arnold	Columbia	Freeholder/Parent
Betty Batty	Dade	Freeholder/Parent
Vera Lemon	Dade	Freeholder/Parent
Ann Tillman	Duval	Freeholder/Parent
Raymond Grant	Gadsden	Freeholder/Parent
Billy Barlow	Gulf	Freeholder/Parent
Dorothy McLean	Hillsborough	Freeholder/Parent
C. Larry Brown	Leon	Freeholder/Parent
June Page	Nassau	Freeholder/Parent
Mildred Dunlap	Orange	Freeholder/Parent
Benjamin J. Crain, Jr.	Seminole	Freeholder/Parent
Margaret Iverson	Volusia	Freeholder/Parent
John Frank Bludworth	Walton	Freeholder/Parent

Name	*County of Residence*	*Freeholder and Parent or Student*
June Hargrave	Alachua	Student.
Patricia Brady	Brevard	Student
Anita Timbrook	Broward	Student
Michael Bright	Collier	Student
Hal Arnold	Columbia	Student
Greg Batty	Dade	Student
Ralph Lemon, Jr.	Dade	Student
Donna Tillman	Duval	Student
Linda Grant	Gadsden	Student
Phoebe Barlow	Gulf	Student
Linda McLean	Hillsborough	Student
Terri Brown	Leon	Student
Steven Page	Nassau	Student
Jolene Dunlap	Orange	Student
Carol Crain	Seminole	Student
Christian Iverson	Volusia	Student
Margaret Bludworth	Walton	Student

4. Defendants Claude R. Kirk, Jr., Ray C. Osborne, Tom Adams, Earl Faircloth, Fred O. Dickinson, Jr., Broward Williams, Floyd T. Christian, and Doyle Conner are the Governor and the Cabinet of the State of Florida who comprise the membership of the State Board of Education which regulates the amount of state of MFP funds which shall be paid to the County Boards of Public Instruction.

In addition, Defendant Floyd T. Christian is the State Commissioner of Education and is charged with the duty of determining the dollar allocation to each county of MFP funds and of notifying and certifying that determination to the Comptroller. Defendant Fred O. Dickinson, Jr., is the Comptroller of the State of Florida and is charged with the duty of disbursing MFP funds to the individual counties.

5. Funds for public education in Florida are derived

from two sources. The first is taxes of general applicability throughout the state. Some of these state-wide taxes produce moneys for General Revenue, from which the legislature makes appropriations for the purpose of public education. The largest of these taxes of general state-wide applicability is the Sales and Use Tax, which produces greater sums for the General Revenue than do the rest of Florida's state-wide taxes combined. Other state-wide taxes produced funds all or part of which are statutorily "earmarked" specifically for educational uses. For instance, a certain portion of the sums collected from the sales of motor vehicle licenses are required to be turned over to the several county school systems for capital outlay. Still other state-wide taxes, such as the Racing Tax, produce sums all or part of which are required by statute to be given to the several counties for use as they see fit. Funds from state-wide taxes which are either appropriated biennially by the legislature from General Revenue, or which are statutorily earmarked for education, or portions of which are turned over to the counties and distributed in turn to the school systems, provide well over 50% of public education's financial support in Florida. (See Column 3 of Exhibit A)

6. The second major source of funds for the support of Florida public schools are two kinds of taxes levied and collected by each county for its own school system. These taxes provide approximately 39% of the financial support of Florida's public schools. (See Column 4 of Exhibit A.) The first tax, known as "County Millage", is authorized by Article XII, Section 8 of the Florida Constitution, which provides that each county Board of Public Instruction (BPI) is annually required to levy for the support of the county schools not less than 3 nor more than 10 mills of tax on each dollar of assessed value of non-exempt prop-

erty in the county.[1] The second tax, known as "District Millage", is authorized by Article XII, Section 10 of the Florida Constitution, which provides that each county BPI may levy for the support of the county schools up to 10 mills of tax on each dollar of non-exempt property in the county provided such millage is first approved by a majority of the county's qualified voters.[2] Each county holds biennial elections for the purpose of approving District Millage for the following two years.[3] Cumulatively, therefore, the County and District Millage can produce a maximum of 20 mills of tax in any county.[4]

[1] Article XII, Section 8 of the Florida Constitution provides as follows:

> Each county shall be required to assess and collect annually for the support of the public free schools therein, a tax of not less than three (3) mills, nor more than ten (10) mills on the dollar on all taxable property in the same.

[2] Article XII, Section 10 of the Florida Constitution provides in pertinent part as follows:

> The Legislature . . . may provide for the levying and collection of a district school tax, for the exclusive use of public free schools within the district, whenever a majority of the qualified electors thereof that pay a tax on real or personal property shall vote in favor of such levy: Provided, that any tax authorized by this section shall not exceed 10 mills on the dollar in any one year on the taxable property of the district.

Each county now has only one tax district, which is coextensive with the boundaries of the county, pursuant to F.S. Sect. 230.34(1), so that the District Millage and the County Millage are imposed on the same geographical area.

[3] See F. S. 236.32 which establishes procedures for the conduct of district millage elections.

[4] While this was the applicable constitutional framework at the time this suit was filed, the constitution has since been amended. The effect of the amendment is to leave the basic structure unchanged except to provide that the amount of millage which may be approved by the voters is now unlimited.

The applicable provision of the new constitution (Article VII, Section 9, which became effective January 20, 1969) is as follows:

> Counties, school districts, and municipalities may be authorized by law to levy ad valorem taxes and other taxes. Millages are limited to 10 mills for all county purposes, 10 mills for municipal purposes, and 10 mills for school purposes. Bond millages are excluded, and additional millages without limitation are permitted if approved by freeholders paying taxes.

7. Various Federal moneys provide the balance of each county's funds for public education. (See Column 2 of Exhibit A.) The amount available to each county from federal sources is, of course, determined by federal law (and is not questioned here).

8. The amount available to each county from its own local taxes is determined by the amount imposed and collected by the county, subject to the limitations described in Paragraph 6. The amount available to each county from the state is determined by the application of a body of statutes collectively described as the Minimum Foundation Program (MFP). (Florida Statutes Sections 236.01-236.071) MFP is a body of rules which enables the responsible officials of the state to calculate the total cost of funding a minimal educational system in each county, and on this basis the amount of the state's contribution to that system is determined. Although the MFP program forms a background for the issues in this lawsuit, the MFP program's formulas are not challenged here.

9. The Instruction Unit is the touchstone by which the amount of MFP funds for each county is determined. Instruction Units are of several sorts, but are based fundamentally on the number of students in average daily attendance in each county school system.* In order to

*INSTRUCTION UNIT. Twenty-seven students in average daily attendance in a regular classroom situation, grades two through twelve, is called an Instruction Unit—the basic unit of educational statistics in Florida. Since the school year 1967-68 the number of pupils required for a first grade instruction unit has been two less than the number required for instruction units in grades two through twelve. Under certain conditions (isolated location, junior college, kindergarten, exceptional child education, vocational education, and adult education) the number of students in an instruction unit, grades two through twelve, varies from 10 to 27 students in average daily attendance.

In addition to the Instruction Unit, other statistical units, derived from the Instruction Unit, are employed in calculating amounts required for support of the public schools. They include:

determine the minimum funding level for each county school system the total number of Instruction Units assignable to that system is calculated.[3] (See Exhibit B for a sample calculation.) This number is then used as a basis for calculating the minimum amounts needed by each county for teacher salaries,[4] transportation,[5] other current expenses,[6] capital outlay and debt service,[7] and educa-

[3] STS UNIT. For each eight earned instruction units, a county school board may ask for a Special Teacher Services Unit. This unit can be used by the school board to fill a position of librarian; music teacher, speech correctionist, school principal, or any one of the special services that are deemed necessary in providing a balanced school program for all boys and girls.

[4] SUPERVISOR OF INSTRUCTION UNIT. Under the law, a county school board may ask for state financing to pay for one Supervisor of Instruction Unit. This supervisory unit might be filled by a person who is the elementary education supervisor, secondary education supervisor, or the county director of instruction. In the counties with more than 100 instruction units, the school boards are permitted to seek state financing for additional supervisor of instruction units at the rate of one per 100 instruction units or fraction thereof. F.S. Sect. 236.04.

[5] INSTRUCTIONAL SALARIES. Amounts allocable to teacher salaries are determined by use of a formula set forth in F.S. Sect. 2360.7 (1), (2) and (3).

[6] TRANSPORTATION. Funds needed for pupil transportation are allocated for each county on the basis of a formula which employs (a) average daily attendance of pupils transported (rather than Instruction Units), (b) number of miles traveled, and (c) population density, as basic factors. F.S. Sect. 236.05, .07(7).

[7] OTHER CURRENT EXPENSES. The MFP provides county BPI's with $1,050 of state funds per instruction unit to help pay other current expenses such as wages of janitors, fuel, utilities, repairs, classroom supplies, books, and other expenses. Where necessary, however, a county may use this expense money for other needed expenditures. F.S. Sect. 236.07(5).

[8] CAPITAL OUTLAY AND DEBT SERVICE. Funds for capital improvements to the county school systems are provided by Article XII, Sect. 18 of the Florida Constitution, which earmarks a portion of the revenue derived from Motor Vehicle Licenses. These funds, allocated on the basis of Instruction Units, may be used to back bond issues or tax anticipation certificates. See also F.S. Sect. 236.07(7).

tional improvement expenses.[10] To this total is added $550 per instruction unit out of funds derived from state sales taxes. The grand total of these amounts make up the cost of the MFP in each county. (F.S. Sect. 236.07(8).)[11]

10. Once the total calculated cost of the MFP is ascertained, the share of that cost which each county must contribute is computed according to a formula described in a footnote.[12]

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[10] EDUCATIONAL IMPROVEMENT EXPENSE. During 1968-69 there is provided from state funds $1,720 for each instruction unit, which sum is to be used by each county for improvement of the educational program in that county. Educational improvement must be projected for a long range period and applied pursuant to a plan approved by the State Board of Education. The use of the $1,720 during 1968-69 must relate to the part of the long range plan that will be initiated in 1968-69. F.S. Sect. 236.07(6).

[11] There are two additional sources of funds for Florida public schools which are not within the MFP. They are:

CAPITAL OUTLAY. For each of the number of pupils in average daily attendance during the last school year which is in excess of the number of pupils in average daily attendance in the immediately preceding school year, a county BPI may receive from the state up to $800, to be applied to the construction of school facilities; provided, that a matching amount equal to 25% of the state amount first be made available from local sources. F.S. Sect. 236.074.

RETIREMENT MATCHING. Each county receives $500 per instruction unit from sales tax revenue for use in making required contributions to teachers' (and state and county officers') retirement systems. F.S. Sect. 236.075. The state contributions are matched with varying amounts withheld as contributions from teachers' salaries. F.S. Sects. 238.09 and 238.11.

[12] For the 1968-69 school year: First, the yield of 3 mills on 95% of the state's non-exempt property is calculated. This product is then multiplied by an Index of Relative Taxpaying Ability which is calculated for each county and based on sales tax returns, employment levels, farm production, amount of railroad and telegraph property, and automobile tax registration within the county. The result is the county share of MFP cost. F.S. Sects. 236.07(9), 236.071.

For the 1969-70 school year and thereafter, each county will be required to provide as its share of MFP cost a sum equal to the amount that would be produced by the levying of 3 mills of tax on 95% of the assessed valuation of non-exempt property in the county for the preceding calendar year. F.S. Sect. 236.07(9).

11. Once the calculations outlined in paragraphs 10 and 11 are completed, the county share is subtracted from the total MFP cost, and the remainder is allocated by the state to the counties as its share of the county Minimum Foundation Program.

12. As a practical matter no county has been able to finance its schools on the amount of the Minimum Foundation Program alone. All have had to levy higher millages, than those which would produce merely the county's required share of MFP cost. See Exhibit C which compares the millage which each county must levy with the millage it had in fact levied prior to the action of the legislature described in Paragraph 13.

13. In its Extraordinary Session of 1968 the Florida Legislature enacted into law Chapter 68-18, Florida Statutes, Senate Bill No. 77-X(68) (hereinafter, C:68-18). Section 23 of that law (now appearing in F.S. 236.251) dictates that no county can receive its state share of MFP funds if its BPI levies more than 10 mills (plus certain adjustments) of local tax (both County and District Millage) on the non-exempt property in the county.

Section 23 provides as follows:

> Effective July 1, 1968 each county board of public instruction desiring to participate in the minimum foundation program for kindergarten and grades one (1) through twelve (12) shall levy no more than ten (10) mills of tax on the non-exempt assessed valuation of the county, exclusive of voted district building and bus, required debt service, and the millage required for junior college minimum effort.

The latter part of the section refers to other statutes by which counties are required to raise by taxation additional moneys for district building and bus funds (F.S.

Sect. 237.13), for required debt service on school bond issues (F.S. Sections 236.29 and 236.53), and for the county share of junior college support funds (F.S. Sect. 230.0117(7)). Section 23 exempts these amounts from the operation of the 10 mill ceiling.

Thus BPI's may levy an aggregate of up to 10 mills *plus* the minor sums of millage necessary to provide district building and bus funds, funds for debt service and funds for junior college support. These three items are hereinafter referred to as "DB&B". Their additional authorizations (above the basic 10 mill limit) may, but usually do not, add as much as 1.5 mills to the basic 10 mill ceiling. (See Column 2b of Exhibit D.)

The Section 23 prohibition means, however, that the total of both the District and County Millages in any Florida County may not exceed the 10 mill limit, plus DB&B if the county wishes to receive state MFP funds. The remainder of Sect. 23 is of limited relevance and is quoted in a footnote with appropriate explanation.[13]

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[13] Section 23 continues:

> If the application of the above millage limitation creates a condition in any county wherein their 1968-69 current operating budget from state and county tax sources cannot exceed their 1967-68 current operating budget by at least one thousand two hundred dollars ($1,200.00) per instruction unit, the allocation of state funds shall be increased to the extent necessary to provide a one thousand two hundred dollar ($1,200.00) increase per instruction unit in their 1968-69 operating budget. [The original enactment appropriated $1000 per instruction unit and was later amended to provide $1200.]

The purpose of this provision is to prevent the 1968-69 operating budget of any county from falling below an amount equal to $1,200 per Instruction Unit more than the 1967-68 level as a result of the Section 23 ceiling. This situation occurred only in Pinellas County, however. This provision increased the state allocation to Pinellas County by $1,200 per Instruction Unit. This provision has no other application. However, it should be noted that this additional sum does *not* bring the Pinellas County 1968-69 operating budget to the level it would have attained

14. Twenty-four counties now have aggregate millage levels which exceed the Section 23 ceiling (10 mills, plus DB&B) while 43 counties do not.[14] (See Column 3 of Exhibit D.) As a result of Sect. 23, the 24 counties have been required to and have reduced their total millage assessments to the level dictated by Section 23. The effect of the Section 23 ceiling is thus to deprive the school systems of the 24 counties of the millage funds in excess of the Section 23 ceiling which they could have assessed during the school years following the July 1, 1968, effective date of Section 23. The citizens and taxpayers (as well as the students in the schools) of these counties, among whom the plaintiffs are numbered, are thereby arbitrarily denied the right to assess, collect and use the taxes which they have approved and which they deem necessary to the maintenance of good public schools. The limitation is arbitrary because it operates unequally, not only as between those relatively wealthy counties unaffected by the millage limitation and the poorer counties

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had Section 23 not been enacted, i.e., had Pinellas County been permitted to levy and collect the millage which was voted for the 1967-69 biennium. (See Column 1 of Exhibit D).

Section 23 continues in pertinent part:

> The millage limitation of 10 mills in this section may be increased to the extent necessary to replace any decrease in funds from Public Law 874 from the previous year.

This provision affects only three of the counties subject to the 10 mill ceiling of Sect. 23: Brevard, Dixie and Seminole. It is intended to permit counties who have lost federal impact area funds in the 1968-69 school year to recoup this loss through the levying of millage in addition to the 10 mill ceiling. The millages shown as DB&B, etc. in Brevard, Dixie and Seminole counties (in column 2(b) of Exhibit D) include .57, .20 and .13 mills, respectively, which are intended to offset the loss of federal funds.

[14] Two counties, Hamilton and Polk, had millages in excess of 10 when Section 23 was enacted. They have since reduced their millage levels to less than 10; and Section 23 does not, therefore, operate to reduce the millage levels in these counties.

which are affected, but also as between the affected counties themselves.

15. Section 23 of C.68-18 limits the amount by which a county may tax itself to provide funds for the education of its children. The standard by which Section 23 imposes this limitation is the amount of the "non-exempt assessed valuation of the county." The state legislature has authorized each county to impose and collect a specified amount of tax for each dollar of assessed valuation in the county. This standard is arbitrary and unreasonable because it bears no rational relation to the educational needs of the county. By contrast, the MFP funds which the state makes available to the county are based on Instruction Units and thus ultimately on the number of pupils, the amount of special services, supervisory services, capital outlay required, and also upon the amount of transportation needed to get the children to school. Section 23, on the other hand, limits the state's authorization to the counties to tax themselves by a standard related only to the amount of non-exempt property in the county. This standard violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. Counties rich in property may, and often do, have few children. Counties poor in property may, and often do, have burgeoning school populations. If the state wishes to place a limit on the extent to which counties may tax themselves to provide funds for the education of their children, it must do so on the basis of the educational needs of the county and not on the basis of a standard which is wholly irrelevant to that need.

The inequities produced can be illustrated in the following tables:

TABLE 1

Dollars Per Child Authorized to be Assessed by the 10 Mill Ceiling of Section 23 in Counties Where Plaintiff's Reside (See Column 10 of Exhibit D)

County	*Dollars Per Child the County May Assess Under the 10 Mill Ceiling of Section 23*
Alachua	$168
Brevard	153
Broward	355
Collier	412
Columbia	137
Dade	333
Duval	160
Gadsden	67
Gulf	160
Hillsborough	173
Leon	200
Nassau	150
Orange	182
Seminole	155
Volusia	228
Walton	134

This table makes clear the inequality between, for example, Gadsden County and Collier County, but the inequality is even more pronounced if this table is compared with the following table:

TABLE 2

Dollars Per Child Authorized to be Assessed by the 10 Mill Ceiling of Section 23 in Selected Other Counties (See Column 10 of Exhibit D)

County	*Dollars Per Child the County May Assess Under the 10 Mill Ceiling of Section 23*
Charlotte	$725
Citrus	441
Flagler	313
Glades	722
Hendry	337
Highlands	377
Indian River	343
Lee	341
Martin	440
Osceola	369
Palm Beach	461
Sarasota	405

Thus, Gadsden County may tax itself only $67.00 per child while Glades County may tax itself $722.00 per child, over 10 times as much.

The fundamental inequity of authorizing counties to tax themselves on the basis of property values is also revealed in the two following tables which compare the tax base per child in selected counties:

TABLE 3

Tax Base Per Child in Counties Where Plaintiffs Reside
(See Column 12 of Exhibit D)

County	*Dollars of Tax Base*
Alachua	$16,769
Brevard	15,341
Broward	35,503
Collier	41,205
Dade	33,263
Duval	16,005
Gadsden	6,672
Gulf	15,972
Hillsborough	17,318
Nassau	14,951
Orange	18,184
Seminole	15,340
Volusia	22,815
Walton	13,423

TABLE 4

Tax Base Per Child in Selected Other Counties

County	*Dollars of Tax Base*
Charlotte	$72,535
Citrus	44,089
Glades	72,207
Highlands	37,724
Indian River	34,274
Lee	34,128
Martin	44,013
Monroe	35,400
Osceola	26,930
Palm Beach	46,052
Sarasota	40,545

Thus, the state says to the child in Gadsden County that he must be content with a tax base of only $6,672.00 on which to raise additional revenues for his education, while his friend in Glades County has $72,000 worth of property on which to raise money to support his education. There is no rational basis for such a distinction.

16. Section 23, C.68-18 is also void under Article XII, §1 of the Florida Constitution which requires the state to operate a "uniform system of public free schools".[15]

17. Unless defendants are enjoined from withholding the state allocation of MFP funds as a consequence of violating Section 23, the plaintiffs and all others similarly situated will suffer irreparable damage for which they are without adequate remedy at law.

WHEREFORE, plaintiffs pray:

(a) that a three-judge court be convened pursuant to 28 U.S.C. Section 2281;

(b) that the portion of Section 23, C.68-18, which imposes an aggregate 10 mill plus DB&B ceiling on the District and County Millages of any Florida county be declared null and void and of no effect pursuant to the procedure provided in 28 U.S.C. 2201-2202;

(c) that defendants be enjoined from withholding any MFP funds from any county under the terms of Section 23, C.68-18; and

---

[15] Article XII, Section 1 provides:

> The legislature shall provide for a uniform system of public free schools, and shall provide for the liberal maintenance of the same.

Since the time of the filing of the complaint, the Florida Constitution has been amended. The counterpart of Article XII, §1 in the new Constitution is Article IX, §1 which in pertinent part provides:

> "Adequate provision shall be made by law for a uniform system of free public schools . . ."

(d) that the court grant such other and further relief as it may deem just and proper.

RICHARD H. FRANK

By .....

Suite 918
Marine Bank Building
Tampa, Florida

CLASSIE, PEWETT, BEEBE & SHANKS

By .....
Hershel Shanks

By .....
Allan I. Mendelsohn
Suite 1200
1819 H Street, N. W.
Washington, D. C. 20006

Attorneys for Plaintiffs

EXHIBIT A

PROVISIONAL ESTIMATES

Percent of Florida School Revenue Receipts Derived From Various Sources Anticipated for 1967-68

County	*Percent Federal Sources*	*Percent State-wide Sources*	*Percent Local Sources*
1	2	3	4
Alachua	1.83%	55.66%	42.51%
Baker	4.34	77.02	18.64
Bay	10.19	63.22	26.59
Bradford	3.57	72.13	24.30
Brevard	20.62	32.70	46.68
Broward	.62	39.56	59.82
Calhoun	3.90	75.95	20.15
Charlotte	1.08	36.83	62.09
Citrus	1.41	44.21	54.38
Clay	9.02	61.24	29.74
Collier	1.97	35.67	62.36
Columbia	5.39	62.60	32.01
Dade	9.03	34.51	56.46
DeSoto	.98	58.77	40.25
Dixie	6.45	56.06	37.49
Duval	3.33	47.63	49.04
Escambia	5.89	52.99	41.62
Flagler	1.41	59.66	38.93
Franklin	2.55	79.62	17.83
Gadsden	4.99	70.98	24.03
Gilchrist	2.43	70.86	26.89
Glades	5.07	49.14	45.79
Gulf	3.23	61.25	35.52
Hamilton	2.21	55.69	42.10
Hardee	1.41	60.64	37.95
Hendry	.96	49.92	49.12
Hernando	2.23	49.90	47.87
Highlands	1.76	52.96	45.28

EXHIBIT A Cont'd.

County	*Percent Federal Sources*	*Percent State-wide Sources*	*Percent Local Sources*
1	2	3	4
Hillsborough	2.14	47.91	49.95
Holmes	5.92	77.77	16.31
Indian River	1.56	43.84	54.60
Jackson	2.39	78.83	18.78
Jefferson	4.11	75.54	20.35
Lafayette	3.00	81.07	15.93
Lake	2.56	46.35	51.09
Lee	2.01	44.16	53.83
Leon	1.86	55.51	42.63
Levy	1.43	65.33	33.24
Liberty	5.35	84.47	10.18
Madison	3.32	79.23	17.45
Manatee	1.73	53.15	45.12
Marion	2.65	53.58	43.77
Martin	.54	44.70	54.76
Monroe	14.29	41.00	44.71
Nassau	3.36	58.04	38.33
Okaloosa	20.18	57.78	22.04
Okeechobee	1.73	57.70	38.57
Orange	1.44	48.64	49.92
Osceola	1.40	50.32	48.28
Palm Beach	1.93	33.56	64.49
Pasco	1.65	50.42	47.93
Pinellas	1.86	39.02	59.12
Polk	1.38	47.09	51.53
Putnam	2.16	54.87	42.97
St. Johns	.66	54.26	45.08
St. Lucie	1.89	50.48	47.63
Santa Rosa	8.74	59.14	32.12
Sarasota	.72	41.68	57.60
Seminole	3.08	57.42	39.50
Sumter	1.62	66.56	31.82

EXHIBIT A Cont'd.

County	*Percent Federal Sources*	*Percent State-wide Sources*	*Percent Local Sources*
1	2	3	4
Suwannee	1.78	68.12	30.10
Taylor	1.96	58.33	39.71
Union	2.85	68.28	28.87
Volusia	2.16	40.89	56.95
Wakulla	4.31	80.72	14.97
Walton	9.01	66.70	24.29
Washington	4.13	81.73	14.14
State Average	3.76	57.19	39.02

Source: County budgets on file with the State Department of Education. Compiled by Research Division, Florida Education Association.

EXHIBIT B

Fla. St. Dept. Ed.
Div. of Finance
May 1968

SUMMARY OF ESTIMATED UNITS, 1968-69

(Basis for Computation of Estimated Foundation Program)

_____ County

ESTIMATED INSTRUCTION UNITS:	Total Units
Grades 1-12 (Previous yr.'s basic units 7218 Provision for 1st Grade Units 27 incr. by 5 mos. ADA incr.) 7,245 by 4.02%	7,536.25
Kindergartens	250.00
Exceptional Children	332.00
Vocational: Agricultural Education	12.20
Distributive, Cooperative, & Business Ed.	152.70
Home Economics Education	76.10
Technical and Health Occupations Education	24.50
Industrial Education	200.65
General Adult Education	105.00
Special Teacher Services Maximum 1036.18	1,086.18
Supervisors of Instruction Maximum 98.00	91.00
TOTAL ESTIMATED INSTRUCTION UNITS	9,866.58

EXHIBIT C

PROVISIONAL ESTIMATES

Millage Required to be Levied If Counties Are to Share in the Minimum Foundation Program, and the Actual Millage Levied For Operation of Schools During 1967-68

County	*Millage Required*	*Millage Levied*
Alachua	3.25	13.00
Baker	4.06	9.11
Bay	2.40	7.64
Bradford	3.18	8.918
Brevard	3.16	14.88
Broward	2.07	10.67
Calhoun	1.99	8.00
Charlotte	1.20	7.45
Citrus	1.55	8.6055
Clay	2.59	9.75
Collier	1.67	11.45
Columbia	3.61	11.729
Dade	2.56	12.32
DeSoto	2.46	9.40
Dixie	2.80	14.874
Duval	3.86	15.8963
Escambia	3.00	13.183
Flagler	2.70	7.59
Franklin	1.82	4.40
Gadsden	4.18	15.50
Gilchrist	2.91	9.18
Glades	1.10	5.01
Gulf	2.83	13.30
Hamilton	2.00	13.63
Hardee	2.25	6.00
Hendry	2.54	9.00
Hernando	2.37	12.868
Highlands	2.05	6.50
Hillsborough	3.12	14.206
Holmes	2.96	7.50
Indian River	1.87	8.931
Jackson	3.42	6.20
Jefferson	3.17	8.30
Lafayette	2.30	4.60

EXHIBIT C Cont'd.

County	*Millage Required*	*Millage Levied*
Lake	2.41	10.00
Lee	2.23	9.519
Leon	2.63	11.762
Levy	2.18	7.80
Liberty	2.28	4.00
Madison	5.14	10.34
Manatee	3.02	12.00
Marion	2.24	8.76
Martin	1.72	8.23
Monroe	1.76	7.74
Nassau	3.30	12.42
Okaloosa	2.60	8.439
Okeechobee	2.86	8.25
Orange	3.82	14.80
Osceola	1.42	7.66
Palm Beach	1.76	9.89
Pasco	2.57	11.425
Pinellas	3.52	18.00
Polk	2.93	11.432
Putnam	3.16	14.271
St. Johns	2.58	8.40
St. Lucie	2.45	8.97
Santa Rosa	1.57	7.586
Sarasota	2.08	10.12
Seminole	2.77	12.75
Sumter	3.20	9.92
Suwannee	3.12	9.374
Taylor	2.53	11.6196
Union	3.07	9.63
Volusia	3.11	14.65
Wakulla	2.17	8.44
Walton	3.93	12.00
Washington	2.33	6.50

Source: State Department of Education; and County Finance, State Comptroller

Prepared by FEA—Research, January, 1968

Florida Counties	Total Millage Originally Levied for 1967–69 Biennium	Millage now in Effect: Allowable Under Sec. 23 (Basic)	Millage now in Effect: DB & B	Tax Millage Secured by Basic Effort (Col. 3 less Col. 4)	Mills Lost Through Sec. 23 (Col. 2 less Col. 3)	Assessed Property Value (Col. 3 less Col. 4)	Revenue Lost Through Sec. 23 (Col. 6 × Col. 7)	Revenue Lost Through DB & B (Col. 6 × Col. 4)	Number of Pupils in Average Daily Attendance (ADA)	Amount which Ten Mills Would Raise in County (Col. 7 × 10 Mills)	Amount which Ten Mills Would Raise in County (Col. 8 × 10 Mills)	Foundation Program Cost (Col. 10 × Average Cost per ADA)	Tax Base Per Pupil in ADA: Actual (Col. 7 ÷ Col. 10)	Tax Base Per Pupil in ADA: Adjusted (Col. 8 ÷ Col. 10)
	1	2	3	4	5	6	7	8	9	10	11	12	13	14
Alachua*	13.00	10	.6	10.36	2.10	8,251,981	$ 344,754	919.20	$ 8,520	20,872	$ 8,519	$ 20,000,000	$16,709	
Baker	9.11	8.28**			.25	598		105.85	2,448	2,108	120	25,308,322	11,950	
Bay	7.64	6.48**			.312	833		748.73	1,441	15,825	218	330,000,000	21,709	
Bradford	8.918	10.00**			.44	887		184.69	3,843	3,305	52	17,785,300	5,259	
Brevard*	11.88	10	1.29	11.29	3.50	856,564	750,961	2,402.10	8,015	87,000	358	875,707,508	15,341	
Broward*	10.67	10	.24	10.24	.43	3,212,294	1,381,372	3,006.50	8,223	90,153	335	3,242,193,402	35,503	
Calhoun	8.00	8.00**				28,785		104.11	2,068	1,937	150	20,053,350	15,022	
Charlotte	7.45	7.45**				194,138		150.02	15,386	2,758	745	299,050,000	72,535	
Citrus	8.6055	8.36**				211,116		181.30	9,822	3,772	441	122,254,000	41,000	
Clay	9.75	10.00**				311,115		286.07	9,871	6,014	337	45,000,000	13,583	
Collier*	11.45	10	—	10.00	1.45	1,000,000	2,000,838	273.52	9,171	6,154	1,127	253,577,000	217,205	
Columbia*	11.729	10	—	10.00	1.729	1,000,000	1,729,000	475.01	2,730	6,021	167	82,110,344	13,692	
Dade*	12.32	10	.28	10.28	2.04	6,841,000	13,956,487	9,601.58	14,332	68,473	2,928	834,073,228	58,182	
De Soto	9.40	10.8**			.55	1,000,000	550,000	118.84	4,632	3,456	250	51,124,170	22,020	
Dixie*	14.871	10	.8787	10.8787	4.0883	20,000	81,766	37.00	3,136	1,381	148	20,424,361	14,760	
Duval*	15.8003	10	.6724	10.6724	5.2212	7,502,500	39,164,733	4,005.12	111,000	109,000	15,000,205	16,035		
Escambia*	13.183	10		10.00	3.183	719,522	2,290,228	1,048.78	3,622	43,107	104	5,784,104	16,372	
Flagler	7.59	8.43**				36,000		50	1,087	1,188	318	26,816,442	31,211	
Franklin*	4.40*	6.38**				20,000		75.74	6,001	1,501	100	20,000,000	19,505	
Gadsden*	15.50	10	.15	10.15	5.35	71,500	301,578	483.73	1,473	10,735	71,560,572	4,722		
Gilchrist	9.18	10.00**				17,078		48.91	1,038	852	100	17,078,766	20,940	
Glades	5.01	5.02**				37,385		44.39	12,082	705	542	37,404,393	74,207	
Gulf*	13.30	10	.55	10.55	2.571	42,104	114,115	126.78	3,315	2,630	160	42,015,700	15,976	
Hamilton	13.63	9.00**				36,000		103.56	3,525	3,000	121	36,502,233	17,000	
Hardee	6.00	6.20**				90,303		143.80	6,722	3,042	315	96,333,944	31,959	
Hendry	9.00	10.00**				87,205		123.50	7,058	3,589	357	87,205,126	33,742	
Hernando*	12.868	10		10.00	2.868	80,326	247,726	139.73	6,208	3,011	337	80,370,474	17,287	
Highlands	6.50	8.00**				208,867		270.60	7,701	5,538	527	208,500,228	38,518	
Hillsborough*	14.206	10		10.00	4.206	1,534,041	6,950,899	1,196.35	5,704	21,805	175	306,324,350	17,318	
Holmes*	7.50	7.50**				26,197		128.03	2,044	2,306	114	26,182,358	11,057	
Indian River*	8.934	9.13**				200,206		315.28	7,907	6,574	333	239,308,304	38,274	
Jackson*	6.20	6.70**				105,250		308.58	5,589	5,830	151	101,014,827	13,150	
Jefferson*	8.50	9.61**				31,636		123.07	2,571	2,704	118	31,863,052	11,753	
Lafayette	4.40	4.40**				12,000		32.01	1,508	438	14	12,840,000	29,452	

* Counties in which Sec. 23 had reduced 1967–69 millages.

** Counties whose original millages were below 10% are not affected by Sec. 23.

*** 1967–68 figure.

† Exclusive of DB & B.

Note: Calculations are based upon figures supplied by the Florida State Department of Education.

ANALYSIS OF EFFECTS OF SECTION 22 ON LOCAL SCHOOL TAX REVENUE

1	2	3	4	5	6	7	8	9	10	11	12
		Millage now in Effect					Amount which Ten Mill Limit of Sec. 22 Permits County to Collect per Instruction Unit, 1968-69 [Col. 11 times Ten Mills divided by Col. 7]		Amount which Ten Mill Limit of Sec. 22 Permits County to Collect per Child, 1968-69 [Col. 11 divided by Ten Mills divided by Col. 9]		
County	Total Millage Originally Levied for 1967-69 Biennium	Allowable Under Sec. 22 (Excluding "DE & R") (a)	(b)	Total Millage Now in Effect [Col. 2 plus Col. 3b]	Mills Lost Through Sec. 22 [Col. 1 minus Col. 4]	Estimated Revenue Produced by One Mill of Tax 1968-69	Revenue Lost as a Result of Sec. 22 [Col. 5 times Col. 6]	Number of Instruction Units 1967-68 (Pursuant to MFP)	Children in Average Daily Attendance (ADA) 1967-68	Total Assessed Valuation of Nonexempt Property 1968-69	Tax Base per Child in ADA [Col. 11 divided by Col. 9]
Lake	20 00	20 00**				$ 398,821	$	617 10	6,457	$3,231*	391	398,838,555	30,122
Lee	9 249	9 249**				523,200		705 81	7,417	15,310	341	528,518,970	34,128
Leon*	11 292	10	—	10 00	1 292	379,457	868,893	913 86	8,147	18,922	299	379,017,020	29,030
Levy	7 80	7 80**				72,470		140 22	3,171	2,742	264	72,565,423	28,443
Liberty	4 00	4 00**				13,369		43 63	3,087	837	161	13,369,742	16,093
Madison	10 31	10 20**				31,384		176 18	1,791	3,325	89	31,391,030	8,929
Manatee*	12 69	10	26	10 26	1 54	331,938	511,031	709 18	4,306	15,428	215	331,856,543	21,496
Marion	8 20	8 20**				370,457		579 06	5,452	14,498	255	370,212,532	25,535
Martin	8 23	9 00**				291,229		243 60	9,421	4,872	410	291,226,484	44,013
Monroe*	9 71	8 45**				393,245		384 11	7,894	8,306	354	393,235,318	35,100
Nassau*	12 42	10	86	10 86	1 56	77,321	120,933	244 68	3,164	5,168	150	77,239,046	24,951
Okaloosa	8 139	10 00**				243,981		862 09	2,826	21,153	115	243,819,296	11,526
Okeechobee	8 25	10 00**				57,340		108 03	5,315	2,326	247	57,340,306	24,570
Orange*	11 80	10	4	10 4	1 40	1,278,247	3,121,287	3,193 31	4,011	70,265	182	1,278,247,984	18,184
Osceola	7 66					156,870**		192 86	8,134	4,248	309	156,880,620	36,930
Palm Beach	9 80	9 80**				2,377,694		2,489 15	10,356	55,977	161	2,377,844,727	16,942
Pasco*	11 428	10	—	10 00	1 425	194,488	277,145	306 22	5,232	8,145	227	194,508,476	22,558
Pinellas*	15 00	10	85	10 85	7 35	1,371,818	11,552,862	3,129 29	8,922	50,207	224	1,371,821,096	22,336
Polk	11 432	8 132**				1,233,622		2,317 29	8,324	49,331	218	1,233,622,553	21,736
Putnam*	14 271	10	1 17	11 17	2 901	133,203	373,102	400 78	3,324	8,173	157	133,203,210	15,721
St. Johns	8 99	8 20**				170,828		293 87	6,018	5,018	152	170,828,779	28,245
St. Lucie	8 97	8 97**				279,491		450 21	6,206	10,139	225	279,491,676	27,512
Santa Rosa	7 546	8 20**				173,830		300 23	4,822	7,822	222	173,830,831	22,204
Sarasota	10 12	10 15**				639,733		754 10	8,555	15,911	405	645,118,854	40,515
Seminole*	12 75	10	10	10 44	2 31	250,132	328,408	715 79	3,499	16,115	155	250,[illegible]215	15,510
Sumter*	9 92	10 00**				49,067		186 28	6,825	3,138	190	49,771,776	19,000
Suwannee	8 374	8 374**				83,855		201 28	5,127	3,960	161	82,918,896	16,141
Taylor*	11 6296	10	2293	10 2293	1 3963	69,852	91,788	173 94	4,993	3,574	1982	69,621,299	19,480
Union	9 62	9 62**	6			15,227		37 05	2,672	1,191	128	15,243,436	12,799
Volusia*	14 65	10	8084	10 8084	3 7584	656,395	2,848,261	1,314 78	5,107	29,218	228	671,181,300	22,815
Wakulla	8 31	9 00**				15,009		29 98	2,030	1,206	111	14,448,889	11,013
Walton*	12 00	10	—	10 00	2 00	31,858***	63,656	178 63	2,883	3,837	134	51,305,652	13,423
Washington	8 20	9 00**				33,913		158 03	2,146	2,782	122	33,909,297	12,189

* Counties to which Sec. 22 had reduced 1967-69 millages.
** Counties whose original millages were below ten are not affected by Sec. 22.
*** 1967-68 figure.
† Exclusive of DE & R.
Note: Calculations are based upon figures supplied by the Florida State Department of Education.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT
OF FLORIDA

ROBERT H. HARGRAVE, et al., Plaintiffs,	)	CIVIL
vs.	)	ACTION
GOVERNOR CLAUDE R. KIRK, JR., et al.,	)	FILE NO. 68-463T
Defendants.	)	

ANSWER TO AMENDED COMPLAINT

Come now the Defendants and for answer to the Amended Complaint filed in this cause say;

1. They admit the allegations of paragraphs 1, 2 and 3 of said Amended Complaint.

2. They admit the allegations of paragraph 4 of said Amended Complaint, except that they deny that Ray C. Osborne is either Governor of the State of Florida or a member of the Cabinet of the State of Florida or a member of the State Board of Education and they deny that the State Board of Education regulates the amount of Minimum Foundation Program funds which shall be paid to county boards of public instruction, such amount being established by statutory formula.

3. They admit the allegations of paragraph 5, except that they allege that funds from state wide taxes are appropriated annually rather than biennially as alleged.

4. They admit that the allegations of paragraph 6 allege the constitutional framework of the State of Florida as it existed at the time suit was filed, but allege that the Constitution of the State of Florida was revised, effective January 7, 1969, and that because of said revision they deny the allegations contained in said paragraph 6.

5. They admit the allegations of paragraph 7.

6. They admit the allegations of paragraph 8, except as to the constitutional limitations specifically cited in paragraph 6 of said Amended Complaint.

7. They admit the allegations of paragraph 9 of said Amended Complaint, except that they deny that the Instruction Unit is enforced in transportation and they allege that the sum $550 set forth in line 3, on page 8, should read $500.

8. They admit the allegations of paragraphs 10 and 11.

9. They admit the allegations of paragraph 12, except that they deny the third sentence thereof beginning with the words "See Exhibit C."

10. They admit the allegations of paragraph 13, except the allegation in footnote 13, "This situation occurred only in Pinellas County, however," which said allegation is denied.

11. They deny the allegations of paragraphs 14, 15, 16 and 17.

RIVERS BUFORD, JR.
General Counsel
State Board of Education
Room 105, The Capitol
Tallahassee, Florida 32304

[Certificate of service omitted in printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

ROBERT H. HARGRAVE, et al.,)
Plaintiffs,)
v.) No. 68-463
) Civ.T.
GOVERNOR CLAUDE R. KIRK, JR.,)
et al.,)
Defendants.)

AFFIDAVIT OF HERSHEL SHANKS

Hershel Shanks, having been duly sworn, hereby states as follows:

1. That he is one of the counsel for plaintiffs in this cause.

2. That, on information and belief, the copy of the memorandum of Floyd T. Christian, dated January 6, 1969, attached hereto and marked Exhibit 1, is a true and correct copy thereof.

3. That, on information and belief, the letter of Ralph N. Staten, Superintendent of Schools of Broward County, dated August 15, 1969 and addressed to Defendant Floyd T. Christian, State Superintendent of Education, attached hereto and marked Exhibit 2, is a true and correct copy thereof.

4. That, on information and belief, the letter of Defendant Floyd T. Christian, State Superintendent of Education, dated August 19, 1969 and addressed to Mr. Ralph N. Staten, Superintendent of Schools, Broward County, attached hereto and marked Exhibit 3, is a true and correct copy thereof.

Hershel Shanks

[Subscription omitted in printing]

EXHIBIT "1"

AD VALOREM TAX MILLAGE FOR SUPPORT AND OPERATION OF PUBLIC SCHOOLS

by

Floyd T. Christian

January 6, 1969

1968-69 Status Report:

All sixty-seven counties now operate under the ten-mill ceiling plus certain additional millage levies as provided in the exceptions enumerated in Chapter 68-18, Florida Statutes.

The following counties have enforced millage reductions in 1968-69:

County	*1967-68 Operating Millage*	*1968-69 Operating Millage*	*Enforced Millage Decrease*	*Approximate Dollar Reduction*
Alachua	13.00	10.60	2.40	$ 802,517
Brevard	14.88	11.29	3.59	2,921,310
Broward	10.67	10.24	.43	1,312,304
Collier	11.45	10.00	—0—*	
Columbia	11.729	10.00	1.729	135,953
Dade	12.32	10.28	2.04	12,812,703
Dixie	14.874	10.8737	4.0003	77,867
Duval	15.8963	10.6701	5.2262	8,899,894
Escambia	13.183	10.00	—0—*	
Gadsden	15.50	10.45	5.05	343,313
Gulf	13.30	10.59	2.71	108,410
Hernando	12.868	10.00	2.868	235,342
Hillsborough	14.206	10.00	4.206	6,609,052
Leon	11.762	10.00	1.762	635,173
Manatee	12.00	10.46	1.54	485,479
Nassau	12.42	10.86	1.56	114,887
Orange	14.80	10.40	4.40	5,343,076
Pasco	11.425	10.00	1.425	263,289
Pinellas	17.00	10.65	6.35	9,481,993

Putnam	14.271	11.47	2.801	354,447
Seminole	12.75	10.44	2.31	549,573
Taylor	11.6196	10.2593	1.3603	90,050
Volusia	14.65	10.8936	3.7564	2,449,349
Walton	12.00	11.00	1.00	48,930
				$54,074,911

*Freeholders voted zero district millage for 1968-69 and 1969-70.

In all cases the major portion of the dollar impact of the enforced millage reduction is being absorbed from the Education Improvement Expense Fund allocation.

The following counties are at, or very near, the ten-mill limit in 1968-69. (No enforced millage reduction for 1968-69)

County	*1968-69 Operating Millage*
Bradford	10.00
Clay	10.00
De Soto	10.80
Gilchrist	10.00
Hamilton	9.00
Hendry	9.00
Indian River	9.131
Jefferson	9.61
Lake	10.00
Lee	9.50
Madison	10.50
Martin	9.00
Okaloosa	10.00
Okeechobee	10.00
Palm Beach	9.89
Sarasota	10.15
Sumter	10.00
Suwannee	9.374
Union	9.63
Wakulla	9.00
Washington	9.00

In almost all cases these counties will be put in the position of eroding the Education Improvement Expense Fund allocation in 1969-70.

Recommendation:

1. Allow the school boards to levy the full ten mills as authorized under current law.
2. Allow the school boards to levy up to the amount of millage which has been voted by the freeholders.

Rationale:

1. The effect of the ten-mill limitation creates a restriction on the amount of local support which certain counties can provide for the educational program.
2. The expression of the freeholders in the local millage election is being negated in those cases where there is a desire to provide a greater amount of local support for the educational program.
3. The use of the Education Improvement Expense Fund to absorb part of the enforced millage rollback has the net effect of destroying the effectiveness of this new dimension in education support and planning. In 1969-70, if the Minimum Foundation Program is funded at the current level of state support, the inverse effectiveness of the Education Improvement Expense Fund will be further demonstrated.
4. Effective July, 1969 the local required effort for the Minimum Foundation Program will be a three-mill levy on the non-exempt assessed valuation in the several counties. There will be some shifting of the required effort and in certain counties this will further restrict the state allocation to these counties.
5. The funding of retirement matching at $500 per

instruction unit will require about $12,000,000 from local funds in order to finance this program during 1968-69. Salary increases in 1969-70 will require the use of additional local funds for retirement matching and in effect will deny the counties the use of these dollars for the education of children.

EXHIBIT "2"

THE BOARD OF PUBLIC INSTRUCTION
OF BROWARD COUNTY, FLORIDA
1320 S.W 4th Street
Fort Lauderdale, Florida
PO Box No. 8369
33310

August 15, 1969

Mr. Floyd T. Christian,
Commissioner of Education,
State Department of Education,
Tallahassee, Florida 32304

Dear Mr. Christian;

The Board of Public Instruction of Broward County, meeting in regular session on August 14th, passed a resolution stating that the Board can not balance its budget for the 1969-70 school year without exceeding the 10-mill cap imposed by the last legislature.

It is impossible for us to submit a budget unless your office agrees that we may include millage funds exceeding 10 mills. Will you please advise us immediately whether or not a budget prepared which includes funds exceeding 10 mills will be accepted by your office?

Respectfully,

Ralph N. Staten, Superintendent.

EXHIBIT "3"

STATE OF FLORIDA
DEPARTMENT OF EDUCATION
Tallahassee 32304
August 19, 1969

Mr. Ralph N. Staten
Superintendent of Schools
Broward County
Post Office Box 8369
Fort Lauderdale, Florida 33310

Dear Superintendent Staten:

In response to your letter of August 15 in which you presented the dilemma the District School Board in Broward County faces in developing an adequate school budget for 1969-70 in light of the limitations of the 10-mill cap, the following information is submitted.

The responsibilities of this office in executing the statutes currently in existence would not permit a budget to be officially approved which included a levy of ad valorem tax in excess of those levies authorized in Section 236.251, Florida Statutes. Therefore, the Annual School Budget for 1969-70 must be developed to comply with this restriction if the district is to continue participation in the Minimum Foundation Program for Kindergarten and Grades 1-12.

I recognize the severe financial difficulties which have resulted from recently enacted statutory provisions, however, there were no alternatives or discretionary authori-

ties provided this office in administering the state and local funds for support of public schools.

Sincerely,

Eloyd T. Christian
FTC:MJ
cc: Mr. Herman O. Myers

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT
OF FLORIDA

CIVIL ACTION FILE NO. 68-463T

ROBERT H. HARGRAVE, et al.,
Plaintiffs

vs.

GOVERNOR CLAUDE R. KIRK, JR., et al.,
Defendants.

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

COME NOW the plaintiffs, by their attorneys, and move the Court for an order granting summary judgment in their favor, on the ground that "there is no genuine issue as to any material fact" and plaintiffs are "entitled to a judgment as a matter of law." Rule 56(c), F.R. Civ. P.

A detailed statement of the facts on which this motion is based and the legal reasons therefore are contained in an accompanying brief.

Respectfully submitted,

GLASSIE, PEWETT, BEEBE & SHANKS
By

Hershel Shanks
Allan I. Mendelsohn
Robert M. Perce, Jr.
Federal Bar Building West
1819 H Street, N. W.
Washington, D.C. 20006

Richard Frank
Suite 918
Marine Bank Building
Tampa, Florida

Attorneys for Plaintiffs

Of Counsel:

David Rubin
1201 Sixteenth Street, N.W.
Washington, D.C. 20036

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT
OF FLORIDA

ROBERT H. HARGRAVE, et al.,	)	
Plaintiffs,	)	
vs.	)	CIVIL AC-
GOVERNOR CLAUD R. KIRK, JR.,	)	TION FILE
et al.,	)	NO. 68-463T
Defendants.	)	

AFFIDAVIT OF LEE YOUNG

Lee Young, having been duly sworn, hereby states as follows:

1. That he is presently Business Manager of Tallahassee Junior College, 444 Appleyard Drive, Tallahassee, Florida 32304; that during the period 1968-1969 he held the position of Specialist in Finance and Salary with the Florida Education Association, 208 W. Pensacola Street, Tallahassee, Florida 32304; that during the period 1955 to 1968 he was Director of County Records and Reports for the State Department of Education, Tallahassee, Florida.

2. That, on information and belief, the facts set forth in Paragraphs 3 through 15 of the Amended Complaint are true and correct; as are the facts set forth in Paragraphs A, B and C of the Statement of the Case contained in the Brief in Support of Plaintiffs' Motion for Summary Judgment and in Exhibits 4 and 5 to this Affidavit; except for the fact that Ray C. Osborne is a member of neither the Cabinet nor the State Board of Education.

3. That, on information and belief, the following additional facts are true and correct:

The process by which the counties budget and allot all funds available for education is prescribed by statute (F.S.

237.05-237.24) and is uniform throughout the state. It begins on or before June 15th of each year, when the State Commissioner of Education certifies to each county school superintendent the estimated number of instruction units upon which state funds shall be allotted to his county in the coming school year. (F.S.A. §237.07).

The next step occurs in early July when the county tax assessor certifies to the school superintendent his estimate of the total value of taxable property which is expected to be assessed on the current year's tax roll. (F.S.A. §§193.25, 237.08). Armed with the information supplied by these two sources, plus his own knowledge of his school system's needs, the superintendent then prepares and submits to his local school board a tentative budget and an estimate of the tax levies needed to fund the budget during the next school year. (F.S.A. §§237.09, 237.10). This must be done by July 15th of each year. (F.S.A. §237.09).

The local board then reviews, modifies, and tentatively approves a budget and County Millage levy, based on the superintendent's submission. (F.S.A. §§237.11, 237.12). This budget and the tentative County Millage levy are then published and a public hearing held upon them during the next-to-last week in July. (F.S.A. §237.12). By August 1st the local board must approve a budget and submit it to the State Commissioner. (F.S.A. §237.12).

Within 30 days the State Commissioner must examine the budget, direct or suggest any changes deemed necessary or desirable, and certify that the budget is satisfactory and has become official. (F.S.A. §§237.14-237.18). When this certification is accomplished, and when the final assessment of taxable property is certified by the tax assessor, the local board proceeds with the levying of taxes.

The local board then sets forth in a resolution the

amounts necessary to be raised from local taxes, the County Millage to be levied, the amount of District Millage which the voters have authorized, the amount of District Millage which is actually to be levied,[1] and directions to the tax assessor that he apply the approved millages to the taxable property within the county. (F.S.A. §237.18(1)).

Thereafter the taxes are calculated and collected in accordance with the applicable statutes. (F.S.A. §§193.30, 193.35, 193.39, 237.18(2), (3), (4)). All taxes are due and payable on November 1st of each year (F.S.A. §193.41), and become delinquent in April of the succeeding year (*Id.*). Discounts for early payment are allowed as follows: November, 4%; December, 3%; January, 2%; February 1%; thereafter, none. (*Id.*)

Lee Young

[Subscription omitted in printing]

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[1] Where school boards have not in the past chosen to levy millage up to their full aggregate authority (*i.e.*, up to the combined amount of County and authorized District Millages), they have levied more heavily from County Millage than District. This is due to the fact that the tax collectors are paid commissions on County levies from general county funds. When collecting District levies, however, the tax collector is paid his commission only from the proceeds of that levy. (F.S.A. §193.65)

	1	2	3	4	5	6	7	7a	7b	8	9	10
	District Millage Levied 1967-68	District Millage Levied 1968-69	County Millage Levied 1967-68	County Millage Levied 1968-69	Total Millage Levied 1967-68	Total Millage Levied 1968-69	Total Millage Authorized 1968-69 by Sec. 24			Decrease in Millage Levied from 1967-68 to 1968-69 (Col. 3 Minus Col. 7c)	Estimated Revenue Produced by 1 Mill 1968-69	Revenue Lost 1968-1969 As Result of Sec. 24
							Basic	DB&B	Total**			
Alachua*	$ 3.00	$ .60	$10.00	$10.00	$13.00	$10.6	$10.00	$ .6	$10.6	$(2.40)***	$ 331,981	$ 844,734
Baker	6.00		3.11	8.23	9.11	8.23	10.00				23,908	
Bay	2.70		4.94	6.44	7.64	6.4	10.00				342,333	
Bradford	3.00		7.918	10.00	8.918	10.0	10.00				44,333	
Brevard*	6.29	1.29	8.39	10.00	14.88	11.29	10.00	1.29	11.29	(3.39)***	836,363	3,073,961
Broward*	2.00	.24	8.67	10.00	10.67	10.24	10.00	.24	10.24	(.43)***	3,212,494	1,381,372
Calhoun	4.70		3.30	8.00	8.00	8.00	10.00				28,733	
Charlotte	0		7.45	7.45	7.45	7.45	10.00				194,186	
Citrus	1.3653	3.76	1.24	4.60	8.6053	8.36	10.00				122,118	
Clay	5.70	3.67	4.05	7.33	9.75	10.00	10.00				92,046	
Collier*	1.45	.375	10.00	10.00	11.45	10.00	10.00		10.00	(1.43)***	233,693	367,858
Columbia*	8.729	.28	3.253	10.00	12.104	10.373	10.00	0.373	10.373	(1.729)***	82,769	143,108
Dade*	3.00	.80	7.32	10.00	12.32	10.28	10.00	.28	10.28	(2.04)***	6,611,392	13,487,056
De Soto	6.10	3.8737	3.30	10.00	9.40	10.8	10.00	.8			34,830	
Dixie*	10.00	7.6701	1.874	7.00	14.874	10.8737	10.00	.8737	10.8737	(4.0993)***	29,489	81,962
Duval*	10.00		5.8963	3.00	15.8963	10.6701	10.00	.6701	10.6701	(5.2262)***	1,792,566	9,368,308
Escambia*	6.00	1.30	7.183	10.00	13.183	10.00	10.00		10.00	(3.183)***	710,322	2,261,392
Flagler	4.39	2.00	3.00	3.84	7.39	8.43	10.00				36,498	
Franklin	1.00	.45	3.10	4.30	4.10	6.3	10.00				30,441	
Gadsden*	10.00	5.00	3.30	10.00	13.30	10.43	10.00	.43	10.43	(3.03)***	71,360	361,378
Gilchrist	4.39		4.30	5.00	9.48	10.00	10.00				17,078	
Glades	2.01	7.00	3.00	5.02	5.01	5.02	10.00				37,383	
Gulf*	10.00	5.00	3.39	3.39	13.39	10.39	10.00	.39	10.39	(2.71)***	42,109	114,113
Hamilton	10.00	3.10	3.63	4.00	13.63	9.0	10.00				36,689	
Hardee	3.00		3.00	3.10	6.00	6.2	10.00				96,333	
Hendry	5.37		3.63	3.00	9.00	9.0	10.00				82,205	
Hernando	8.464		4.404	10.00	12.868	10.00	10.00		10.00	(2.868)***	86,376	247,726
Highlands	3.20	1.70	3.30	3.30	6.50	8.00	10.00				208,867	
Hillsborough	10.00		4.206	10.00	14.206	10.00	10.00		10.00	(4.206)***	1,634,041	6,936,896
Holmes	4.30		3.00	6.30	7.30	7.30	10.00				26,167	

Indian River	3.742	1.00	3.189	5.731	8.931	9.131	10.00					249,306	
Jackson	3.20		3.00	6.70	6.20	6.7	10.00					103,040	
Jefferson	5.00		3.30	9.61	8.30	9.61	10.00					31,636	
Lafayette	1.30		3.30	4.60	4.60	4.60	10.00					14,847	
Lake	2.50		7.30	10.00	10.00	10.00	10.00					398,341	
Lee	4.490		5.029	9.50	9.519	9.50	10.00					523,500	
Leon*	6.00		5.762	10.00	11.762	10.00	10.00		10.00	(1.762)***		379,457	668,603
Levy	4.50		3.30	7.80	7.80	7.80	10.00					72,470	
Liberty	.70		3.30	4.00	4.00	4.00	10.00					13,469	
Madison	5.94	.50	4.40	10.00	10.34	10.50	10.00	.50				31,384	
Manatee*	2.00	.46	10.00	10.00	12.00	10.46	10.00	.46	10.46	(1.54)***		331,838	511,031
Marion	5.76	5.7	3.00	3.00	8.76	8.7	10.00					370,137	
Martin	1.698	1.00	6.532	8.00	8.23	9.00	10.00					201,226	
Monroe	4.10	1.50	3.64	6.95	7.74	8.45	10.00					305,245	
Nassau*	5.00	.86	7.42	10.00	12.42	10.86	10.00	.86	10.86	(1.56)***		77,521	120,933
Okaloosa	4.00		4.439	10.00	8.439	10.00	10.00					243,981	
Okeechobee	4.95		3.30	10.00	8.25	10.00	10.00					37,380	
Orange*	6.00	.40	8.80	10.00	14.80	10.4	10.00	.4				1,278,247	3,624,287
Osceola	2.00	1.97	5.66	5.37	7.66	7.34	10.00					195,825	
Palm Beach	4.47	4.47	5.42	5.42	9.89	9.89	10.00					2,577,681	
Pasco*	6.75		4.675	10.00	11.425	10.00	10.00		10.00	(1.425)***		194,488	277,143
Pinellas*	7.00	.63	10.00	10.00	17.00	10.63	10.00	.63	10.63	(6.35)***		1,571,818	11,352,862
Polk	3.00		8.432	8.975	11.432	8.975	10.00					1,233,622	
Putnam*	8.926	1.47	5.345	10.00	14.271	11.47	10.00	1.47	11.47	(2.801)***		133,203	373,102
St. Johns	1.00	1.00	7.40	7.30	8.40	8.3	10.00					170,823	
St. Lucie	0		8.97	8.97	8.97	8.97	10.00					279,491	
Santa Rosa	4.286		5.30	5.30	7.586	5.3	10.00					173,680	
Sarasota	4.00	.37	6.12	9.78	10.12	10.15	10.00	.15				639,735	
Seminole*	6.00	.44	6.75	10.00	12.75	10.44	10.00	.44	10.44	(2.31)***		250,432	378,498
Sumter	.06		8.86	10.00	9.92	10.00	10.00					60,067	
Suwannee	6.00		3.374	9.374	9.374	9.374	10.00					63,085	
Taylor*	8.07393	.2393	3.5403	10.00	11.6196	10.2393	10.00	.2393	10.2393	(1.3603)***		69,682	94,788
Union	6.00		3.63	9.63	9.63	9.63	10.00					15,227	
Volusia*	10.00	.8936	4.65	10.00	14.65	10.8936	10.00	.8936	10.8936	(3.7364)***		686,365	2,378,261
Wakulla	3.00		3.44	9.00	8.44	9.00	10.00					15,008	
Walton*	8.18	6.00	3.82	5.00	12.00	11.00	10.00	1.00	11.00	(1.00)***		51,303	51,303
Washington	3.20	3.20	3.30	5.80	6.50	9.00	10.00					33,913	

* Counties in which Sec. 23 reduced millages authorized for 1967-69.
** Counties with total authorized millages below 10 are not affected by Sec. 23.
*** Indicates reduction to come within Sec. 23 limit.

	1 Average Daily Attendance 1968–69	2 Tax Base (Total Assessed Valuation of Non-Exempt Property) 1968–69	3 Tax Base Per Child in ADA 1968–69	4 Total Amount Per Child Collectible Under Sec. 24
Alachua	20,554	$ 350,000,000	$17,028	$170.28
Baker	2,304	25,908,322	11,245	112.45
Bay	16,503	340,000,000	20,602	206.02
Bradford	3,584	17,785,300	4,962	49.62
Brevard	58,599	875,797,538	14,946	149.46
Broward	96,592	3,212,494,402	33,258	332.58
Calhoun	1,945	29,053,390	14,937	149.37
Charlotte	3,104	200,050,900	64,449	644.49
Citrus	2,915	122,214,096	41,926	419.26
Clay	7,395	91,936,968	12,432	124.32
Collier	6,665	253,577,000	38,046	380.46
Columbia	6,133	82,449,344	13,444	134.44
Dade	216,381	6,598,065,223	30,493	304.93
De Soto	2,496	54,124,170	21,684	216.84
Dixie	1,437	20,424,161	14,213	142.13
Duval	112,847	1,792,566,203	15,885	158.85
Escambia	43,738	705,784,104	16,137	161.37
Flagler	1,146	36,516,428	31,864	318.64
Franklin	1,567	30,000,000	19,145	191.45
Gadsden	10,285	71,560,872	6,958	69.58
Gilchrist	849	17,078,766	20,116	201.16
Glades	815	57,404,893	70,435	704.35
Gulf	2,660	42,015,700	15,795	157.95
Hamilton	2,091	36,597,253	17,502	175.02
Hardee	3,017	96,333,044	31,930	319.30
Hendry	2,742	87,205,126	31,803	318.03
Hernando	3,152	86,376,774	27,404	274.04
Highlands	5,693	208,690,228	36,657	366.57
Hillsborough	92,410	1,556,329,556	16,842	168.42
Holmes	2,470	26,182,558	10,600	106.00
Indian River	7,530	249,306,934	33,108	331.08
Jackson	7,908	101,614,827	12,853	128.53
Jefferson	2,712	31,663,022	11,675	116.75
Lafayette	667	14,847,727	22,260	222.60
Lake	13,735	398,638,555	29,024	290.24
Lee	17,092	528,518,670	30,792	307.92
Leon	18,306	379,017,020	20,705	207.05
Levy	3,051	72,505,423	23,764	237.64
Liberty	848	13,469,742	15,884	158.84
Madison	3,528	31,561,030	8,946	89.46
Manatee	15,737	331,858,543	21,088	210.88
Marion	14,767	370,212,532	25,070	250.70
Martin	4,852	201,226,484	41,473	414.73
Monroe	9,330	303,235,318	32,501	325.01
Nassau	5,462	77,239,046	14,141	141.41
Okaloosa	24,270	243,819,296	10,046	100.46
Okeechobee	2,484	57,380,306	23,100	231.00
Orange	72,694	1,278,247,984	17,584	175.84
Osceola	4,501	156,880,690	34,851	348.51
Palm Beach	58,678	2,577,844,727	43,932	439.32
Pasco	9,202	191,608,476	20,822	208.22
Pinellas	73,810	1,571,621,096	21,293	212.93
Polk	49,778	1,233,622,953	24,782	247.82
Putnam	8,962	133,203,210	14,863	148.63
St. Johns	6,330	170,828,779	26,987	269.87
St. Lucie	10,362	279,491,676	26,973	269.73
Santa Rosa	8,265	173,680,831	21,014	210.14
Sarasota	19,604	645,118,854	38,853	388.53
Seminole	16,677	250,432,215	15,017	150.17
Sumter	3,499	59,771,776	18,685	186.85
Suwannee	3,887	62,948,896	16,195	161.95
Taylor	3,707	69,621,299	18,781	187.81
Union	1,214	15,243,436	12,556	125.56
Volusia	30,416	671,181,500	22,067	220.67
Wakulla	1,464	14,448,880	9,869	98.69
Walton	3,728	51,505,652	13,816	138.16
Washington	2,754	33,999,207	12,313	123.13

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF FLORIDA
CIVIL ACTION FILE NO. 68-463T

ROBERT H. HARGRAVE, et al.,)
Plaintiffs,)

v.)

GOVERNOR CLAUDE R. KIRK, JR.,)
et al.,)
Defendants.)

MOTION FOR SUMMARY JUDGMENT

Come now the Defendants, by their attorney, and move the court for an order granting a Summary Judgment in their favor on the ground that there is no genuine issue as to any material fact and the Defendants are entitled to a judgment as a matter of law.

Respectfully submitted,

RIVERS BUFORD, JR.
General Counsel
State Board of Education
The Capitol, Suite 105
Tallahassee, Florida 32304

[Certificate of service omitted in printing.]

UNITED STATES DISTRICT COURT MIDDLE DISTRICT OF FLORIDA
No. 68-463-Civ.-T

ROBERT H. HARGRAVE, et al.,)
Plaintiffs,)

vs.)

GOVERNOR CLAUDE R. KIRK, JR.,)
et al.,)
Defendants.)

Before DYER, Circuit Judge, LIEB, Chief District Judge, and KRENTZMAN, District Judge.

DYER, Circuit Judge:

Plaintiffs[1] by this class action attack, under the Equal Protection Clause of the Fourteenth Amendment, the constitutionality of Section 23, Chapter 68-18 Florida Laws, enacted at the Extraordinary Session of 1968 of the Florida Legislature, F.S.A. § 236.251,[2] commonly referred to as the "Millage Rollback Act," which provides that any county that imposes on itself more than ten mills in *ad valorem* property taxes for educational purposes will not be eligible to receive state minimum foundation program (MFP) funds for the support of its public education system.

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[1] Each of the plaintiffs is a citizen of Florida and a resident of one of sixteen counties, and is either a freeholder parent or student in the public schools of Florida.

[2] The statute provides in pertinent part:

> Effective July 1, 1968, each county board of public instruction desiring to participate in the minimum foundation program for kindergartens and grades one through twelve shall levy no more than ten mills of tax on the non-exempt assessed valuation of the county, exclusive of voted district building and bus, required debt service, and the millage required for junior college minimum effort.

Plaintiffs seek to enjoin the defendants[3] from enforcing the statute.

A single District Judge dismissed the suit. The Court of Appeals reversed the District Court's jurisdictional rulings and concluded that the complaint presented a substantial constitutional question. It remanded with directions to convene a three-judge District Court. *Hargrave v. McKinney*, 5 Cir. 1969, 413 F.2d 320. After answer was filed both parties moved for Summary Judgment on the ground that there was no issue of material fact. We agree that the case is ripe for decision.

Florida's public schools are financially supported by statewide and local taxation. Minimum Foundation Program (MFP) funds are appropriated by the state and distributed to the counties in accordance with certain indices of the educational needs of a particular county. This program is not under attack. By its calculations the MFP determines the cost of funding a minimal education system in a county. From this total cost there is deducted a certain minimum amount which each county must raise itself if it desires to receive state MFP funds. The difference is the amount of MFP funds which the state appropriates to the County.

The other source of funds for the support of public education is derived from local taxation. Local taxes are of two kinds. The first, known as County Millage, is imposed by the School Board. It cannot exceed ten mills. Fla. Const. (1968 Revision), art. VII, § 9. The second, known as District Millage, must be authorized by a vote of the freeholders and then may be imposed by the School Board. *Ibid.* Additionally the Federal Government contributes about two or three percent to public education in Florida.

[3] The defendants constitute the membership of the State Board of Education and others who regulate the amount of state MFP funds which is paid to the County Boards of Education.

Under the Millage Rollback Act the District and County Millages cannot exceed in the aggregate ten mills, plus the millage necessary to provide district building and bus funds, funds for debt service and funds for junior college support. These latter funds are not involved in, nor are they material to, a determination of this case.

Prior to the passage of the Millage Rollback Act, the voters in 24 counties had authorized their School Boards, for the school years 1967-1968, 1968-1969, to impose District Millage in addition to the ten mills of County Millage which could be imposed by the Board without voter authorization. With the passage of the Act each of these 24 counties rolled back its millage to the ten mill limit for the 1968-1969 school year to avoid losing state MFP funds. The result was to reduce the amount of money derived from local taxes for educational purposes which counties could raise for themselves. Measured by the reduction in millage from the year before the Act was passed the loss exceeded $50,000,000.00. See Appendix.

The plaintiffs contend that the Millage Rollback Act violates the Equal Protection Clause of the Fourteenth Amendment because the limitation is fixed by reference to a standard which relates solely to the amount of property in the County, not to the educational needs of the county. The plaintiffs argue that the Act promotes no compelling state interest, and is arbitrary and unreasonable because it fails to provide Florida children with an economically equal educational opportunity.

The defendants counter by contending that the difference in the dollars available does not necessarily produce a difference in the quality of education; that the relief sought cannot remedy the evil alleged; that the Act does not constitute a blanket prohibition against a county levying additional *ad valorem* taxes because it may choose to do so and forego its MFP funds; and finally, that on the principle of

comity we should abstain from considering the case in deference to a state court proceeding, filed subsequent to this suit, attacking the validity of the Millage Rollback Act.

We take up defendant's last argument first. We find no special circumstances in this case that would persuade us to apply the doctrine of abstention. The fact that a state remedy is available is not a valid basis for federal court abstention. *Monroe v. Pape*, 1961, 365 U.S. 167, 183, 81 S.Ct. 473, 5 L.Ed. 2d 492; *McNeese v. Board of Education*, 1963, 373 U.S. 668, 671, 88 S.Ct. 1433, 10 L.Ed.2d 622; *Zwickler v. Koota*, 1967, 389 U.S. 241, 251, 88 S.Ct. 391, 19 L.Ed.2d 444. There can be no doubt in this case about what the statute means. It defies any interpretation that would or could avoid or modify the constitutional question. In such a case it is the duty of a federal court to exercise its jurisdiction. *Zwickler v. Koota, supra; Harman v. Forssenius*, 1965, 380 U.S. 528, 534-535, 85 S.Ct. 1177, 14 L.Ed.2d 50; *cf. Reetz v. Bozanick*, 1970, ___ U.S. ___ (No. 185, October Term, 1969, Fed. 25, 1970); *Wright v. City of Montgomery, Alabama*, 5 Cir. 1969, 406 F.2d 867, 871, *cert. granted*, 38 LW 3035. Nor does the fact that the instant case involves a state tax scheme bring it within the proscription of 28 U.S.C.A. § 1341 or the abstention doctrine of *Great Lakes Dredge & Dry Dock Co. v. Huffman*, 1943, 319 U.S. 293, 63 S.Ct. 1070, 87 L.Ed. 1407. Section 1341 prohibits federal courts from enjoining the assessment, levy or collection of any tax under state law where the state law provides an efficient remedy; *Great Lakes* requires abstention where only declaratory relief is sought with regard to a state statute relating to the assessment, levy or collection of taxes. The considerations underlying Section 1341 and the *Great Lakes* abstention doctrine are inapplicable here because the plaintiffs in the instant case are not attempting to strike down an assessment and collection scheme but, on the contrary, are attempting to obtain the right to have such a scheme.

Turning now to the defenses asserted, it may be that in the abstract "the difference in dollars available does not necessarily produce a difference in the quality of education." But this abstract statement must give way to proof to the contrary in this case. For example, with the enforced millage reduction in 1968-1969, the approximate dollar reduction in Broward County alone exceeded $1,300,000. As a result of this, the Board of Public Instruction of Broward County informed the State Superintendent of Schools that it could not balance its budget for the 1969-1970 school year without exceeding the ten mill limit. Furthermore, the unreality of the defendant's contention is pointed up by the wide disparities which the Millage Rollback Act creates. For example, Charlotte County by using the ten mill limit may raise, by its own taxes, $725 per student, while Bradford County, also using the ten mill limit, can raise only $52 per student. What apparently is arcane to the defendants is lucid to us—that the Act prevents the poor counties from providing *from their own taxes* the same support for public education which the wealthy counties are able to provide.

The argument that the relief sought cannot remedy the evil alleged gives us little pause. First it does not meet the constitutional issue under the Equal Protection Clause. Second, the proven facts simply contradict the possibility posed by the defendants that School Boards will not choose to levy taxes in excess of ten mills.

The defendants finally urge that the counties are not prohibited from levying *ad valorem* taxes in excess of ten mills because they may choose to do so and forego their MFP funds. This fact, in defendants' view avoids the constitutional issue. We disagree. The State may not grant a benefit subject to a condition which violates the equal protection clause. *See, Sherbert v. Verner*, 1963, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965; *Keyishian v. Board of Re-*

gents of New York, 1967, 385 U.S. 589, 605-6, 87 S.Ct. 675, 17 L.Ed.2d 629.

The disposition of the defendants' contentions does not dispose of the case. We cannot circumnavigate the issue squarely presented by the plaintiffs, *i.e.*, does the Act which imposes a ten mill limit on the authority of the counties to tax themselves without losing MFP funds violate the Equal Protection Clause because the limitation is fixed by reference to a standard which relates solely to the amount of property in a county and not to the educational needs of the county? The determination of this question depends first upon whether there is any rational basis for the distinction drawn. If there is a rational basis for the distinction, it must then be determined if the right which is infringed is "a basic, fundamental right," and, if so, whether the distinction which the legislature has drawn serves a "compelling state interest." *McDonald v. Board of Election*, 1969, 394 U.S. 802, 806-07, 89 S.Ct. 1404, 22 L.Ed.2d 739.

We start with the proposition that the equal protection clause requires "the uniform treatment of persons standing in the same relation to the governmental action questioned or challenged." *Reynolds v. Sims*, 1964, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506. Even though the Act in question applies uniformly to each county it may nevertheless violate the Equal Protection Clause if its effect is discriminatory. *See McLaughlin v. Florida*, 1964, 379 U.S. 184, 191, 85 S.Ct. 283, 13 L.Ed.2d 222.

What rational basis can be found for the distinctions that are inherent in the Act? Do they have any rational relationship to a legitimate state end or are they based on reasons totally unrelated to the pursuit of that goal? *McDonald v. Board of Election, supra.* What interest has the State of Florida in preventing its poorer counties from

providing as good an education for their children as its richer counties? As postulated by the plaintiffs, "The legislature says to a county, 'You may not raise your own taxes to improve your own school system, even though that is what the voters of your county want to do.'" We have searched in vain for some legitimate state end for the discriminatory treatment imposed by the Act.

While the state undoubtedly has a valid interest in preserving the fiscal integrity of its programs, and may legitimately attempt to limit its expenditures for public education, or any other purpose, it "may not accomplish such a purpose by invidious discrimination between classes of its citizens." *Shapiro v. Thompson*, 1969, 394 U.S. 618, 633, 89 S.Ct. 1322, 22 L.Ed.2d 600.

Stressing education as a "sine qua non to the proper functioning of our polity," plaintiffs urge that education must be regarded as a fundamental right and that rather than apply the "rational basis" standard, the Act can be sustained only if it can be shown to promote a "compelling governmental interest." *Shapiro v. Thompson, supra; McDonald v. Board of Election Commissioners, supra.* Having concluded that there is no rational basis for the distinction which the legislature has drawn, we decline the invitation to explore the fundamental-right-to-an-education thesis; and thus we do not reach the more exacting "compelling interest" approach.

We are not unmindful of the recent decision of *McInnis v. Shapiro*,[1] N.D.Ill. 1968, 293 F. Supp. 327, (three-judge

[1] Judge Bell wrote a strong dissent in the case *sub judice* when it was on appeal from a dismissal by a single District Judge. *Hargraves v. McKinney, supra,* at 328 He expressed the view that a federal court should be reluctant to interfere with the fiscal affairs of the state; that no discrimination could be shown because there is no uniform valuation of property in Florida for assessment purposes, and that in the light of *McInnis* the equal protection clause did not require the apportioning of school funds among the districts according to the educational needs of the students. After a discussion of *McInnis*, we will take up the first two grounds of the dissent *post*.

court), *aff'd sub nom. McInnis v. Ogilvie*, 1969, 394 U.S. 322, (followed by *Burruss v. Wilkerson*, W.D. Va. 1969, 301 F. Supp. 1237, (three-judge court), *aff'd*, ___ U.S. ___, 38 LW 3310 (1970)), which held that the Fourteenth Amendment does not require that public school expenditures be made only on the basis of pupils' educational needs. However, *McInnis* is readily distinguishable from the instant case. There the laws structuring the financing of public schools in Illinois were challenged because "State statutes which permit such wide variations [in the expenditure per student from district to district] allegedly deny the less fortunate Illinois students of their Constitutional rights." *McInnis*, at 330. The Court carefully pointed out that "the General Assembly's delegation of authority to school districts appears designed to allow individual localities to determine their own tax burden according to the importance which they place upon public schools." *Id.* at 333. This delegation of power was upheld. The opposite situation confronts us in this case where the school districts (counties) are seeking, through the plaintiffs, *to be able* "to determine their own tax burden according to the importance which they place upon public schools.

The Florida Act *prevents* the *local Boards* from adequately financing their children's education. The complaint is not that the state *permits* the Boards to spend less, but that it *requires* them to spend less. Plaintiffs are asking to be able to *raise* more money *locally*. In *McInnis* the plaintiffs wanted the *state* to *give* them more. Irrespective of the plaintiffs' successful attack on the Act, we know that there will continue to be disparities in per pupil expenditures in Florida, either because some counties may not desire to spend as much as other counties on the education of their children, or because, in the poorer counties, they cannot. Plaintiffs do not contest the variations in per pupil expenditures from these causes, but only "the unequal impediment

placed on us by the state because we are poor." We consider this to be a fundamental distinction between the cases.

The alternative ground for denying relief in *McInnis* was that reallocation of state funds was sought on the basis of varying educational needs of the individual students. How this was to be achieved was unclear, and the term "educational needs" was found to be a nebulous concept. The court found that, in any event, "educational need" was a judicially unmanageable standard. 293 F. Supp. at 336.

In contrast, in the instant case the plaintiffs' argument simply stated is that the Equal Protection Clause *forbids* a state from allocating authority to tax by reference to a formula based on wealth. Unlike the broad relief sought in *McInnis*, the remedy here is simple—an injunction against state officials from taking any action because of a county's refusal to limit its taxes to ten mills imposed by the Act. We conclude that the problems presented by *McInnis* are not present here.

As an epilogue, when this case was before the Court of Appeals the Plaintiffs sought to require various local tax collectors to collect more than $62,000,000 in back taxes. By amendment before this Court, the only relief sought is an injunction against the application of the Millage Rollback Act. The granting of this relief will give the disadvantaged counties authority to raise their taxes above the ten mill limit, and the defendants will continue to distribute the MFP funds to the local counties in precisely the same manner and to the same extent as in the past. Thus, our judgment holding the Act unconstitutional will not interfere at all with the state's fiscal affairs and operations, nor will it interfere with the orderly and effective

operation of the schools or the assessment and collection of taxes."

For the reasons we have outlined we hold that the provisions of the Millage Rollback Act, F.S.A. § 236.251—which required as a condition of participation in the state's Minimum Foundation Program that a county board of public instruction "shall levy no more than ten mills of tax on the non-exempt assessed valuation of the county, exclusive of voted district building and bus, required debt service, and the millage required for junior college minimum effort"—is unconstitutional. The plaintiffs' Motion for Summary Judgment is granted and the defendants are enjoined from withholding MFP funds from any county by virtue of the provisions of such Act.

Entered:
May 8, 1970

DAVID W. DYER
United States Circuit Judge

JOSEPH P. LIEB
United States District Judge

BEN KRENTZMAN
United States District Judge

[5] The amendment of the complaint and change in the relief sought has, we believe, overcome the objections voiced by Judge Bell in his dissent to the convening of a three-judge court. *See* note 4, *supra*.

APPENDIX

The following counties have enforced millage reductions in 1968-69:

County	*1967-68 Operating Millage*	*1968-69 Operating Millage*	*Enforced Millage Decrease*	*Approximate Dollar Reduction*
Alachua	13.0	10.60	2.40	$ 802,517
Brevard	14.88	11.29	3.59	2,921,310
Broward	10.67	10.24	.43	1,312,304
Collier	11.45	10.00	—0—*	
Columbia	11.729	10.00	1.729	135,953
Dade	12.32	10.28	2.04	12,812,703
Dixie	14.874	10.8737	4.0003	77,867
Duval	15.8963	10.6701	5.2262	8,899,894
Escambia	13.183	10.00	—0—*	
Gadsden	15.50	10.45	5.05	343,313
Gulf	13.30	10.59	2.71	108,410
Hernando	12.868	10.00	2.868	235,342
Hillsborough	14.206	10.00	4.206	6,609,052
Leon	11.762	10.00	1.762	635,173
Manatee	12.00	10.46	1.54	485,479
Nassau	12.42	10.86	1.56	114,887
Orange	14.80	10.40	4.40	5,343,076
Pasco	11.425	10.00	1.425	263,289
Pinellas	17.00	10.65	6.35	9,481,993
Putnam	14.271	11.47	2.801	354,447
Seminole	12.75	10.44	2.31	549,573
Taylor	11.6196	10.2593	1.3603	90,050
Volusia	14.65	10.8936	3.7564	2,449,349
Walton	12.00	11.00	1.00	48,930
				$54,074,911

*Freeholders voted zero district millage for 1968-69 and 1969-70.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT
OF FLORIDA

ROBERT H. HARGRAVE, et al., Plaintiffs, v. GOVERNOR CLAUDE R. KIRK, JR., Governor State of Florida, RAY C. OSBORNE, Lieutenant Governor, State of Florida, TOM ADAMS, Secretary of State, State of Florida, EARL FAIRCLOTH, Attorney General, State of Florida, FRED O. DICKINSON, JR., Comptroller, State of Florida, BROWARD WILLIAMS, Treasurer, State of Florida, FLOYD T. CHRISTIAN, Commissioner of Education, State of Florida, and DOYLE CONNER, Commissioner of Agriculture, State of Florida, Defendants.	)	Civil Action No. 68-463T

NOTICE OF APPEAL

Notice is hereby given that the above named Defendants hereby appeal to the Supreme Court of the United States from that Judgment and Order of the United States District Court for the Middle District of Florida, Tampa Division, entered May 8, 1970, wherein and whereby the Court found Section 236.251, Florida Statutes, to be unconstitutional and wherein and whereby the Court enjoined the Defendants from withholding distribution of state school moneys to local school boards when such distribution is prohibited by the provisions of Section 236.251, Florida Statutes.

The statutes under which this appeal is taken to the

Supreme Court of the United States are 28 U.S.C. §§ 2281, 2284, 1253 and 2101.

Dated at Tallahassee, Florida this 2nd day of June, 1970.

RIVERS BUFORD, JR.
General Counsel
State Board of Education
347 South Duval Street
Tallahassee, Florida 32304

[Certificate of service omitted in printing.]

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 573

GOVERNOR CLAUDE R. KIRK, JR., *et al.*,

Appellants,

v.

ROBERT H. HARGRAVE, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

JURISDICTIONAL STATEMENT

RIVERS BUFORD, JR.
General Counsel
State Board of Education
347 S. Duval Street
Tallahassee, Florida 32304

STEPHEN MARC SLEPIN
Counsel
State Board of Education
347 S. Duval Street
Tallahassee, Florida 32304

Attorneys for Appellants

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Article VII, § 8

Article VII, § 9

Article IX, § 1

State Statutes

Section 230.251, Florida Statutes

IN THE

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OCTOBER TERM, 1970

No.

GOVERNOR CLAUDE R. KIRK, JR., *et al.*,

Appellants,

v.

ROBERT H. HARGRAVE, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

JURISDICTIONAL STATEMENT

Appellants appeal from the Judgment and Order of a three-judge District Court for the Middle District of Florida, dated May 8, 1970, holding that the provisions of § 236.251, Florida Statutes, are unconstitutional, granting the Appellees' Motion for Summary Judgment and enjoining the Appellants from complying with the provisions of § 236.251, Florida Statutes.

OPINION AND ORDER BELOW

A copy of the Opinion and Order of the three-judge District Court is contained in the Appendix, *infra*, pp. 7-16.

JURISDICTION

The Order of the three-judge District Court was dated May 8, 1970, and Notice of Appeal was filed in the District Court of the Middle District of Florida on June 3, 1970. (Appendix pp. 17-18) The jurisdiction of the Supreme Court to review this decision and Order by direct appeal is conferred by 28 U.S.C., § 1253. The following decisions, among many, sustain the jurisdiction of the Supreme Court to review the Judgment and Order on direct appeal in this case: *Palmetto Fire Ins. Co. v. Conn.* 272 U.S. 295, 305; *Florida Lime and Avacado Growers, Inc. v. Jacobsen*, 362 U.S. 73, 85; *Shelton v. Tucker*, 364 U.S. 479; *Biggett v. Bullitt*, 377 U.S. 360; *Flast v. Cohen*, 392 U.S. 83.

STATUTES INVOLVED

Involved here is the constitutionality of the provisions of § 236.251, Florida Statutes. A copy of said statute is set forth in the Appendix, *infra*, p. 19.

QUESTION PRESENTED

Do the provisions of § 236.251, Florida Statutes, which establish certain conditions precedent for the participation by a local school district in a plan for state financial assistance to local school districts, violate provisions of the United States Constitution?

STATEMENT OF THE CASE

The State of Florida, pursuant to constitutional authorization[1], makes provision by law for the operation of the

[1] Article IX, § 1, Constitution of Florida

State of Florida public schools. Such schools are financed partially from ad valorem taxes collected within each school district, partially from appropriations by the State to the several school districts and partially by Federal grants and other grants and donations.

Under the provisions of Article VII, §9, of the Florida Constitution, a school district may levy ad valorem taxes not in excess of 10 mills on each dollar of assessed valuation for school purposes. That section of the Constitution also authorizes freeholders within each school district to authorize by referendum the levying of additional taxes for school purposes for periods not in excess of two years.

Appropriation of State moneys (principally derived from sales and use tax) to local school districts is authorized by Article VII, §8, of the Florida Constitution, which provides that State funds may be appropriated to the several school districts upon such conditions as may be provided by general law.

In the 1968 Special Session of the Florida Legislature convened to deal with educational financing in the State of Florida, provision was made for an increased allocation of State moneys to the several school districts. In view of the increased appropriation of State moneys for local school purposes and in an attempt to promote a more uniform system of ad valorem taxation within the several counties, the Legislature enacted §236.251, Florida Statutes, here under attack, which established a condition, as authorized by Article VII, §8, of the Florida Constitution, upon the appropriation of these State moneys to local school districts. This condition simply stated was that in order to be eligible for State appropriated funds a school district must not assess more than 10 mills of ad valorem tax for school purposes. (There were certain minor exceptions to the 10 mill limitation, but such exceptions are not really material to the issues of this case.)

The Appellees, in their various capacities as freeholders, parents or students in the public schools, filed this suit in the United States District Court for the Middle District of Florida alleging the unconstitutionality of § 236.251, Florida Statutes, because of their contention that 10 mills of ad valorem tax in one school district would produce fewer dollars per child for education purposes than would 10 mills of ad valorem tax in another county. Thus, Appellees argued, the State could not constitutionally impose an ad valorem tax limitation as a condition precedent to the receipt of State funds in aid of local education. After joinder of issues, Appellants and Appellees each filed Motions for Summary Judgment. The Appellees' Motion for Summary Judgment was granted, the Court below finding the provisions of § 236.251, Florida Statutes, to be unconstitutional and enjoining the Appellants from withholding State funds from local school districts which exceeded the millage limitation established by § 236.251, Florida Statutes.

THE QUESTIONS ARE SUBSTANTIAL

In holding that § 236.251, Florida Statutes, is incompatible with the Constitution of the United States, the Court below has held that State aid in support of local education may not be conditioned upon reasonable prerequisites established by the Legislature.

The principles for which this case stands as enunciated by the Court below should be fully briefed and argued before this Court.

CONCLUSION

For the reasons stated above jurisdiction should be noted.

Respectfully submitted,

RIVERS BUFORD, JR.
General Counsel
State Board of Education
347 S. Duval Street
Tallahassee, Florida 32304

STEPHEN MARC SLEPIN
Counsel
State Board of Education
347 S. Duval Street
Tallahassee, Florida 32304

Attorneys for Appellants

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

No. 68-463-Civ.-T

ROBERT H. HARGRAVE, et al.,
Plaintiffs,

vs.

GOVERNOR CLAUDE R. KIRK, JR., et al.,
Defendants.

Before DYER, Circuit Judge, LIEB, Chief District Judge, and KRENTZMAN, District Judge.

DYER, Circuit Judge:

Plaintiffs[1] by this class action attack, under the Equal Protection Clause of the Fourteenth Amendment, the constitutionality of Section 23, Chapter 68-18 Florida Laws, enacted at the Extraordinary Session of 1968 of the Florida Legislature, F.S.A. § 236.251,[2] commonly referred to as the "Millage Rollback Act," which provides that any county that imposes on itself more than ten mills in *ad valorem* property taxes for educational purposes will not be eligible to receive

[1] Each of the plaintiffs is a citizen of Florida and a resident of one of sixteen counties, and is either a freeholder/parent or student in the public schools of Florida.

[2] The statute provides in pertinent part:

Effective July 1, 1968, each county board of public instruction desiring to participate in the minimum foundation program for kindergartens and grades one through twelve shall levy no more than ten mills of tax on the non-exempt assessed valuation of the county, exclusive of voted district building and bus, required debt service, and the millage required for junior college minimum effort.

state minimum foundation program (MFP) funds for the support of its public education system. Plaintiffs seek to enjoin the defendants[3] from enforcing the statute.

A single District Judge dismissed the suit. The Court of Appeals reversed the District Court's jurisdictional rulings and concluded that the complaint presented a substantial constitutional question. It remanded with directions to convene a three-judge District Court. *Hargrave v. McKinney*, 5 Cir. 1969, 413 F.2d 320. After answer was filed both parties moved for Summary Judgment on the ground that there was no issue of material fact. We agree that the case is ripe for decision.

Florida's public schools are financially supported by statewide and local taxation. Minimum Foundation Program (MFP) funds are appropriated by the state and distributed to the counties in accordance with certain indices of the educational needs of a particular county. This program is not under attack. By its calculations the MFP determines the cost of funding a minimal education system in a county. From this total cost, there is deducted a certain minimum amount which each county must raise itself if it desires to receive state MFP funds. The difference is the amount of MFP funds which the state appropriates to the County.

The other source of funds for the support of public education is derived from local taxation. Local taxes are of two kinds. The first, known as County Millage, is imposed by the School Board. It cannot exceed ten mills. Fla. Const. (1968 Revision), art. VII, 9. The second, known as District Millage, must be authorized by a vote of the freeholders and then may be imposed by the School Board. *Ibid.* Additionally

[3] The defendants constitute the membership of the State Board of Education and others who regulate the amount of state MFP funds which is paid to the County Boards of Education.

the Federal Government contributes about two or three percent to public education in Florida.

Under the Millage Rollback Act the District and County Millages cannot exceed in the aggregate ten mills, plus the millage necessary to provide district building and bus funds, funds for debt service and funds for junior college support. These latter funds are not involved in, nor are they material to, a determination of this case.

Prior to the passage of the Millage Rollback Act, the voters in 24 counties had authorized their School Boards, for the school years 1967-1968, 1968-1969, to impose District Millage in addition to the ten mills of County Millage which could be imposed by the Board without voter authorization. With the passage of the Act each of these 24 counties rolled back its millage to the ten mill limit for the 1968-1969 school year to avoid losing state MFP funds. The result was to reduce the amount of money derived from local taxes for educational purposes which counties could raise for themselves. Measured by the reduction in millage from the year before the Act was passed the loss exceeded $50,000,000.00. See Appendix.

The plaintiffs contend that the Millage Rollback Act violates the Equal Protection Clause of the Fourteenth Amendment because the limitation is fixed by reference to a standard which relates solely to the amount of property in the County, not to the educational needs of the county. The plaintiffs argue that the Act promotes no compelling state interest, and is arbitrary and unreasonable because it fails to provide Florida children with an economically equal educational opportunity.

The defendants counter by contending that the difference in the dollars available does not necessarily produce a

difference in the quality of education; that the relief sought cannot remedy the evil alleged; that the Act does not constitute a blanket prohibition against a county levying additional *ad valorem* taxes because it may choose to do so and forego its MFP funds; and finally, that on the principle of comity we should abstain from considering the case in deference to a state court proceeding, filed subsequent to this suit, attacking the validity of the Millage Rollback Act.

We take up defendant's last argument first. We find no special circumstances in this case that would persuade us to apply the doctrine of abstention. The fact that a state remedy is available is not a valid basis for federal court abstention. *Monroe v. Pape*, 1961, 365 U.S. 167, 183, 81 S.Ct. 473, 5 L.Ed.2d 492; *McNeese v. Board of Education*, 1963, 373 U.S. 668, 671, 88 S.Ct. 1433, 10 L.Ed. 2d 622; *Zwickler v. Koota*, 1967, 389 U.S. 241, 251, 88 S.Ct. 391, 19 L.Ed.2d 444. There can be no doubt in this case about what the statute means. It defies any interpretation that would or could avoid or modify the constitutional question. In such a case it is the duty of a federal court to exercise its jurisdiction. *Zwickler v. Koota, supra*; *Barman v. Lorssenius*, 1965, 380 U.S. 528, 534-535, 85 S.Ct. 1177, 14 L.Ed.2d 50; *cf. Reetz v. Bozanick*, 1970, _____ U.S. _____ (No. 185, October Term, 1969, Feb. 25, 1970); *Wright v. City of Montgomery, Alabama*, 5 Cir. 1969, 406 F.2d 867, 071, *cert. granted*, 38 LW 3035. Nor does the fact that the instant case involves a state tax scheme bring it within the proscription of 28 U.S.C.A. 1341 or the abstention doctrine of *Great Lakes Dredge & Dry Dock Co. v. Huffman*, 1943, 319 U.S. 293, 63 S.Ct. 1070, 87 L.Ed. 1407. Section 1041 prohibits federal courts from enjoining the assessment, levy or collection of any tax under state law where the state law provides an efficient remedy; *Great Lakes* requires abstention where only declaratory relief is sought with regard to a state statute relating to the assessment, levy or collection of taxes. The

considerations underlying Section 1341 and the Great Lakes abstention doctrine are inapplicable here because the plaintiffs in the instant case are not attempting to strike down an assessment and collection scheme but, on the contrary, are attempting to obtain the right to have such a scheme.

Turning now to the defenses asserted, it may be that in the abstract "the difference in dollars available does not necessarily produce a difference in the quality of education." But this abstract statement must give way to proof to the contrary in this case. For example, with the enforced millage reduction in 1968-1969, the approximate dollar reduction in Broward County alone exceeded $1,300,000. As a result of this, the Board of Public Instruction of Broward County informed the State Superintendent of Schools that it could not balance its budget for the 1969-1970 school year without exceeding the ten mill limit. Furthermore, the unreality of the defendant's contention is pointed up by the wide disparities which the Millage Rollback Act creates. For example, Charlotte County by using the ten mill limit may raise, by its own taxes, $725 per student, while Bradford County, also using the ten mill limit, can raise only $52 per student. What apparently is arcane to the defendants is lucid to us—that the Act prevents the poor counties from providing from their own taxes the same support for public education which the wealthy counties are able to provide.

The argument that the relief sought cannot remedy the evil alleged gives us little pause. First it does not meet the constitutional issue under the Equal Protection Clause. Second, the proven facts simply contradict the possibility posed by the defendants that School Boards will not choose to levy taxes in excess of ten mills.

The defendants finally urge that the counties are not prohibited from levying *ad valorem* taxes in excess of ten

mills because they may choose to do so and forego their MFP funds. This fact, in defendants' view, avoids the constitutional issue. We disagree. The State may not grant a benefit subject to a condition which violates the equal protection clause. *See, Sherbert v. Verner*, 1963, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965; *Kevishian v. Board of Regents of New York*, 1967, 385 U.S. 589, 605-6, 87 S.Ct. 675, 17 L.Ed.2d 629.

The disposition of the defendants' contentions does not dispose of the case. We cannot circumnavigate the issue squarely presented by the plaintiffs, *i.e.*, does the Act which imposes a ten mill limit on the authority of the counties to tax themselves without losing MFP funds violate the Equal Protection Clause because the limitation is fixed by reference to a standard which relates solely to the amount of property in a county and not to the educational needs of the county? The determination of this question depends first upon whether there is any rational basis for the distinction drawn. If there is a rational basis for the distinction, it must then be determined if the right which is infringed is "a basic, fundamental right," and, if so, whether the distinction which the legislature has drawn serves a "compelling state interest." *McDonald v. Board of Election*, 1969, 394 U.S. 802, 806-07, 89 S.Ct. 1404, 22 L.Ed.2d 739.

We start with the proposition that the equal protection clause requires "the uniform treatment of persons standing in the same relation to the governmental action questioned or challenged." *Reynolds v. Sims*, 1964, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506. Even though the Act in question applies uniformly to each county it may nevertheless violate the Equal Protection Clause if its effect is discriminatory. *See McLaughlin v. Florida*, 1964, 379 U.S. 184, 191, 85 S.Ct. 283, 13 L.Ed.2d 222.

What rational basis can be found for the distinctions that are inherent in the Act? Do they have any rational relationship to a legitimate state end or are they based on reasons totally unrelated to the pursuit of that goal? *McDonald v. Board of Election, supra.* What interest has the State of Florida in preventing its poorer counties from providing as good an education for their children as its richer counties? As postulated by the plaintiffs, "The legislature says to a county, 'You may not raise your own taxes to improve your own school system, even though that is what the voters of your county want to do.'" We have searched in vain for some legitimate state end for the discriminatory treatment imposed by the Act.

While the state undoubtedly has a valid interest in preserving the fiscal integrity of its programs, and may legitimately attempt to limit its expenditures for public education, or any other purpose, it "may not accomplish such a purpose by invidious discrimination between classes of its citizens." *Shapiro v. Thompson*, 1969, 394 U.S. 618, 633, 89 S.Ct. 1322, 22 L.Ed.2d 600.

Stressing education as a "sine qua non to the proper functioning of our polity," plaintiffs urge that education must be regarded as a fundamental right and that rather than apply the "rational basis" standard, the Act can be sustained only if it can be shown to promote a "compelling governmental interest." *Shapiro v. Thompson, supra; McDonald v. Board of Election Commissioners, supra.* Having concluded that there is no rational basis for the distinction which the legislature has drawn, we decline the invitation to explore the fundamental-right-to-an-education thesis, and thus we do not reach the more exacting "compelling interest" approach.

We are not unmindful of the recent decision of *McInnis v. Shapiro*,[4] N.D. Ill. 1968, 293 F. Supp. 327, (three-judge court), *aff'd sub nom. McInnis v. Ogilvie*, 1969 394 U.S. 322, (followed by *Burruss v. Wilkerson*, W.D. Va. 1969, 304 F. Supp. 1237, (three-judge court), *aff'd*, _____ U.S. _____, 38 LW 3310 (1970)), which held that the Fourteenth Amendment does not require that public school expenditures be made only on the basis of pupils' educational needs. However, *McInnis* is readily distinguishable from the instant case. There the laws structuring the financing of public schools in Illinois were challenged because "State statutes which permit such wide variations [in the expenditure per student from district to district] allegedly deny the less fortunate Illinois students of their Constitutional rights." *McInnis*, at 330. The Court carefully pointed out that "the General Assembly's delegation of authority to school districts appears designed to allow individual localities to determine their own tax burden according to the importance which they place upon public schools." *Id.* at 333. This delegation of power was upheld. The opposite situation confronts us in this case where the school districts (counties) are seeking, through the plaintiffs, to be able "to determine their own tax burden according to the importance which they place upon public schools."

The Florida Act prevents the local Boards from adequately financing their children's education. The complaint is not that the state permits the Boards to spend less, but that it requires

[4] Judge Boll wrote a strong dissent in the case *sub judice* when it was on appeal from a dismissal by a single District Judge. *Hargraves v. McKinney*, *supra*, at 328. He expressed the view that a federal court should be reluctant to interfere with the fiscal affairs of the state; that no discrimination could be shown because there is no uniform valuation of property in Florida for assessment purposes, and that in the light of *McInnis* the equal protection clause did not require the apportioning of school funds among the districts according to the educational needs of the students. After a discussion of *McInnis*, we will take up the first two grounds of the dissent *post*.

them to spend less. Plaintiffs are asking to be able to raise more money locally. In *McInnis* the plaintiffs wanted the state to give them more. Irrespective of the plaintiffs' successful attack on the Act, we know that there will continue to be disparities in per pupil expenditures in Florida, either because some counties may not desire to spend as much as other counties on the education of their children, or because, in the poorer counties, they cannot. Plaintiffs do not contest the variations in per pupil expenditures from these causes, but only "the unequal impediment placed on us by the state because we are poor." We consider this to be a fundamental distinction between the cases.

The alternative ground for denying relief in *McInnis* was that reallocation of state funds was sought on the basis of varying educational needs of the individual students. How this was to be achieved was unclear, and the term "educational needs" was found to be a nebulous concept. The court found that, in any event, "educational need" was a judicially unmanageable standard. 293 F. Supp. at 336.

In contrast, in the instant case the plaintiffs' argument simply stated is that the Equal Protection Clause forbids a state from allocating authority to tax by reference to a formula based on wealth. Unlike the broad relief sought in *McInnis*, the remedy here is simple—an injunction against state officials from taking any action because of a county's refusal to limit its taxes to ten mills imposed by the Act. We conclude that the problems presented by *McInnis* are not present here.

As an epilogue, when this case was before the Court of Appeals the plaintiffs sought to require various local tax collectors to collect more than $62,000,000 in back taxes. By amendment before this Court, the only relief sought is an injunction against the application of the Millage Rollback Act.

The granting of this relief will give the disadvantaged counties authority to raise their taxes above the ten mill limit, and the defendants will continue to distribute the MFP funds to the local counties in precisely the same manner and to the same extent as in the past. Thus, our judgment holding the Act unconstitutional will not interfere at all with the state's fiscal affairs and operations, nor will it interfere with the orderly and effective operation of the schools or the assessment and collection of taxes.[5]

For the reasons we have outlined we hold that the provisions of the Millage Rollback Act, F.S.A. § 236.254 which required as a condition of participation in the state's Minimum Foundation Program that a county board of public instruction "shall levy no more than ten mills of tax on the non-exempt assessed valuation of the county, exclusive of voted district building and bus, required debt service, and the millage required for junior college minimum effort" is unconstitutional. The plaintiffs' Motion for Summary Judgment is granted and the defendants are enjoined from withholding MFP funds from any county by virtue of the provisions of such Act.

Entered:
May 8, 1970

/s/ David W. Dyer
United States Circuit Judge

/s/ Joseph P. Lieb
United States District Judge

/s/ Ben Krentzman
United States District Judge

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[5] The amendment of the complaint and change in the relief sought has, we believe, overcome the objections voiced by Judge Bell in his dissent to the convening of a three-judge court. *See* note 4, *supra*.

IN THE
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT
OF FLORIDA

ROBERT H. HARGRAVE, et al., Plaintiffs, v. GOVERNOR CLAUDE R. KIRK, JR., Governor, State of Florida, RAY C. OSBORNE, Lieutenant Governor, State of Florida, TOM ADAMS, Secretary of State, State of Florida, EARL FAIRCLOTH, Attorney General, State of Florida, FRED O. DICKINSON, JR., Comptroller, State of Florida, BROWARD WILLIAMS, Treasurer, State of Florida, FLOYD T. CHRISTIAN, Commissioner of Education, State of Florida, and DOYLE CONNER, Commissioner of Agriculture, State of Florida, Defendants.	) Civil Action No. 68-463

NOTICE OF APPEAL

Notice is hereby given that the above named Defendants hereby appeal to the Supreme Court of the United States from that Judgment and Order of the United States District Court for the Middle District of Florida, Tampa Division, entered May 8, 1970, wherein and whereby the Court found Section 236.251, Florida Statutes, to be unconstitutional and wherein and whereby the Court enjoined the Defendants from withholding distribution of state school moneys to local school boards when such distribution is prohibited by the provisions of Section 236.251, Florida Statutes.

The statutes under which this appeal is taken to the Supreme Court of the United States are 28 U.S.C. §§ 2281, 2284, 1253 and 2101.

Dated at Tallahassee, Florida this 2nd day of June, 1970.

RIVERS BUFORD, JR.
General Counsel
State Board of Education
347 South Duval Street
Tallahassee, Florida 32304

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Notice of Appeal has been furnished to Hershel Shanks, Esq., Allan I. Mendelsohn, Esq. and Robert M. Perce, Jr., Esq., of Glassie, Pewett, Beebe & Shanks, Federal Bar Building West, 1819 H Street, N.W., Washington, D. C. 20006; Richard Frank, Esq., Suite 918, Marine Bank Building, Tampa, Florida; and David Rubin, Esq., 1201 Sixteenth Street, N.W., Washington, D. C. 20006, by mail this 2nd day of June, 1970.

RIVERS BUFORD, JR.
Attorney for Defendants

236.251 Tax levy; participation in minimum foundation program; limitation.

(1) Effective July 1, 1968, each school board desiring to participate in the minimum foundation program for kindergartens and grades one through twelve shall levy no more than ten mills of tax on the nonexempt assessed valuation of the district, exclusive of voted district building and bus, required debt service, and the millage required for junior college minimum effort. If the application of the above millage limitation creates a condition in any district wherein its 1968-69 current operating budget from state and district tax sources cannot exceed its 1967-68 current operating budget by at least twelve hundred dollars per instruction unit, the allocation of state funds shall be increased to the extent necessary to provide a twelve hundred dollar increase per instruction unit in its 1968-69 operating budget.

(2) For the purposes of this section, current operating budget shall mean the total budget from state sources as provided in §§236.07(10) and 236.075 and local taxes, exclusive of the amount collected for building and bus, required debt service, and junior college minimum required effort.

(3) The millage limitation of ten mills in this section may be increased to the extent necessary to replace any decrease in funds from Public Law 874 from the previous year.

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IN THE

Supreme Court of the United States

October Term, 1970

No. 573

GOVERNOR CLAUDE R. KIRK, JR., ET AL.,
Appellants,

-v.-

ROBERT H. HARGRAVE, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

BRIEF OF AMICUS CURIAE, FLORIDA EDUCATION RESEARCH FOUNDATION

WILLIAM H. ADAMS, III
Post Office Box 4099
Jacksonville, Florida 32201

NATHAN H. WILSON
Jacobs Building
Jacksonville, Florida 32202

IN THE

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

BRIEF OF AMICUS CURIAE, FLORIDA EDUCATION RESEARCH FOUNDATION

The Florida Education Research Foundation respectfully submits this brief amicus curiae and urges that the decision of the District Court (313 F. Supp. 944) invalidating Section 236.251, Florida Statutes, be reversed.

STATEMENT OF INTEREST

The Florida Education Research Foundation was formed in response to a growing awareness that great disparities exist among Florida counties in their ability to pay for educational services and that, as a result, the educational services

provided for children in poor counties are substantially inferior to those provided in wealthy counties. Membership in the Foundation is composed of parents and educators from relatively poor counties who feel that their children are at a disadvantage because the quality of education available to children in Florida depends in large measure on the wealth of the county in which they live.

The Foundation was organized to explore the reasons for existing inequalities in educational services and to disseminate information and recommendations on possible means of equalizing educational opportunities throughout the State.

The Foundation agrees with the fundamental proposition that the equal protection clause should be construed to prevent discrimination in educational services solely on the basis of wealth. However, it disagrees with the view of the District Court that the Millage Rollback Act contributes to existing discrimination in Florida. It believes that a proper development of the case in the District Court would have disclosed that the statute declared unconstitutional was one facet of a complex strategy designed to promote educational equality and that, if it is not reversed, the effect of the District Court's decision will be to increase rather than diminish existing disparities in educational opportunity.

ARGUMENT

POINT I

THE ISSUE OF WHETHER THE STATUTES INVALIDATED BY THE DISTRICT COURT IS A REASONABLE MEANS OF ACHIEVING EDUCATIONAL EQUALITY AND TAX EQUALIZATION IS TOO COMPLEX TO BE RESOLVED BY SUMMARY JUDGMENT.

In its decision, the District Court announced that it had "searched in vain for some legitimate state end for the discriminatory treatment imposed by the Act." (373 F. Supp. 948). It concluded, therefore, that the Act had no rational basis and that it was unconstitutional. We submit that if the facts had been fully developed in the District Court, it would have been clear that:

1. In Florida, as in many other states, a tremendous disparity exists among school districts in their ability to pay for public education. Since the ad valorem tax is the only local source of revenue available to support public schools, a county's ability to pay for educational services can be measured by the number of dollars that a tax levy of one mill would raise per pupil in average daily attendance (ADA). Measured in this way, the ability of school districts to pay for educational services in Florida ranges from $77.14 in Glades County to $7.22 in Gadsden County. Put another way, it would require a tax levy at the rate of 107 mills in Gadsden County to raise the same amount per pupil as Glades County could raise by a tax levy of 10 mills. Eliminating the millage cap might result in much higher tax rates in poorer counties but it would produce very little additional funds. The only effective means of neutralizing local disparities is increased state aid to local schools.

2. The disparity among the counties in their ability to pay for educational services has been partially counteracted by the application of state funds, primarily through the Minimum Foundation Program. Nevertheless, substantial inequalities still exist among the counties in total expenditures per pupil.

3. The reasons for the educational inequalities that remain are:

(a) Major differences in wealth from county to county;

(b) Reliance on property taxes when property is no longer the primary indicia of ability to pay;

(c) Insufficient state equalizing funds due to (i) the unwillingness of legislators from rich counties to vote for taxes which will be used mainly to provide educational services in other counties; and (ii) the reluctance of many legislators to take upon themselves the onus of voting additional state taxes if the needed funds can be made available locally by voter referendum; and

(d) The increasing unwillingness of voters who have little understanding of the complexities of school financing and who are influenced by extraneous considerations to vote additional taxes needed for public schools.

4. The Governor's Commission For Quality Education in a comprehensive report which was issued December 22, 1967, shortly before the Special Legislative Session at which the Millage Rollback Act was passed urged enactment of a statute limiting and equalizing local millage rates. The pertinent provision of the Report read:

> Each district should contribute its shares of approximately 25 percent by levying a school millage which is uniform throughout the entire state. Thus each taxpayer would be paying the same ad valorem tax rate regardless of the school district in which he lives. The State Board of Equalization should guarantee a fair and uniform ad valorem assessment, providing the equalization principle essential to any sound program of school financing. *Each school district should be given the latitude to levy a higher tax rate, up to a ten mill maximum to provide for education programs which it may wish to initiate but cannot be financed within the prescribed allowance.* The restriction of ten mills would be one-half of the millage presently permitted by the Constitution. The school millage elec-

tion becomes obsolete under this system. (Emphasis supplied).

5. The Act which was declared unconstitutional by the District Court was passed along with other enactments as part of a legislative package designed to implement the recommendations of the Governor's Commission. The effect of the total package was to decrease substantially previous inequities both in educational funding and in the rate of taxes imposed for educational services.

6. The political effect of the statute in subsequent sessions of the Legislature has been to produce greater state aid to local schools and to diminish inequalities both in total expenditures per pupil and in tax rates levied for education. Although major inequities remain in total expenditures per pupil, they are not due to the Millage Rollback Act. Without the Act and the political pressure it exerts in favor of state funding, the remaining inequities would probably be greater.

If the facts had been properly developed in the District Court it would have been clear that consideration of the Act in isolation outside the total context of public school financing was improper and prevented the Court from understanding its purpose. By entering a summary judgment declaring the Millage Rollback Act invalid, the Court eliminated a powerful political incentive which was intended to and which has in fact put primary responsibility on the state legislature for equalizing educational opportunities.

POINT II

THE STATUTE WHICH WAS INVALIDATED BY THE DISTRICT COURT WAS A REASONABLE MEANS OF (A) PROMOTING EDUCATIONAL EQUALITY AMONG THE COUNTIES AND (B) ELIMINATING GROSS INEQUITIES AMONG THE COUNTIES IN PROPERTY TAX RATES LEVIED FOR EDUCATIONAL SERVICES.

The act invalidated by the District Court was part of an overall legislative package in which state aid to local schools was increased. It was one of several acts which substantially diminished inequalities among the counties in total expenditures per pupil and moved in the direction of equalizing taxes levied for public school purposes.

The only way to achieve educational equality is for the states to accept increased responsibility for educational funding by voting more state funds, distributing them by a formula which counteracts local inequalities, and limiting the use of local taxes for public schools. This is clear from studies made by the Advisory Commission on Intergovernmental Relations which has called on the state to adopt such a program.

John Shannon, Assistant Director of the Advisory Commission, testified on October 6, 1970, before the Senate Select Committee on Equal Educational Opportunity. He urged the states to relieve local school districts of virtually all responsibility for financing education. He listed five considerations underlying this position:

> First and foremost, State takeover would represent a giant step toward equalization of educational opportunity.
>
> * * *
>
> Second, State assumption of most of the responsibility for school financing is necessary in order to fix political accountability for educational finance where it belongs—at the doorstep of the Governor and State legislature.
>
> * * *
>
> Third, State takeover of educational financing responsibility will hurry history along with respect to the measurement of student achievement.
>
> * * *
>
> Fourth, State financing of our schools is necessary because the combined expenditure demands of education

and local government are placing too great a burden on the property tax base in general and on our low income householders in particular.

* * *

Fifth, by lifting most of the school financing burden off the local property tax base, the State would also undercut much of the fiscal logic that now supports exclusionary zoning practices in many suburban jurisdictions.

In dealing with objections to state financing, Mr. Shannon made the following statement:

The Commission believes that localities should continue to administer the schools even though the State provides all, or nearly all, of the money. The Commission also believes that localities should be empowered to supplement the State funds from local sources. *But, to achieve the recommendation's dual purposes, any local financial supplement should be strictly limited—perhaps to not more than 10 percent.* Otherwise the local property tax would not be freed up, and state-wide equality of educational opportunity would not be assured. (Emphasis supplied)

The act which was declared invalid by the District Court is part of an evolving program which closely follows the recommendations of the Advisory Commission.

CONCLUSION

We respectfully submit that in a proper case, this Court should hold that the equal protection clause of the Constitution prevents discrimination in educational services on the basis of wealth. However, the discrimination that exists in Florida was not produced by the Millage Rollback Act. It was created by reliance on local property taxes. The improvement in recent years has come from discouraging this reliance. The discrimination that remains is caused by inadequate state fund-

ing and by residual inequities in the formula by which state funds are distributed. The decision of the District Court encourages a return to local effort. Instead of promoting equal protection of the laws the decision, if not reversed, would produce greater educational inequality.

It is submitted that the decision should be either reversed outright or returned to the District Court for a full development of the factual context.

Respectfully submitted,

William H. Adams, III.
P. O. Box 4099
Jacksonville, Florida 32201

Nathan H. Wilson
Jacobs Building
Jacksonville, Florida 32202

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OCTOBER TERM, 1970

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v.

ROBERT H. HARGRAVE, ET AL., *Appellees*

On Appeal From the United States District Court for the Middle District of Florida

---

MEMORANDUM FOR APPELLEES

GLASSIE, PEWETT, BEEBE & SHANKS
By
HERSHEL SHANKS
ALLAN I. MENDELSOHN
ROBERT M. PERCE, JR.
Federal Bar Building West
1819 H Street, N. W.
Washington, D. C. 20006

RICHARD H. FRANK
918 Marine Bank Building
Tampa, Florida 33602

Attorneys for Appellees

DAVID RUBIN
1201 Sixteenth Street, N. W.
Washington, D. C. 20006
Of Counsel

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---

MEMORANDUM FOR APPELLEES

In appellees' view, the decision of the three-judge court below is eminently correct; we nevertheless believe that the decision merits plenary review by this Court because approximately 34 states have laws substantially identical to the one declared unconstitutional below and because the area of the law involved in this case is in need of doctrinal clarification.

STATEMENT OF FACTS

This suit attacks, under the Equal Protection Clause, a Florida statute commonly referred to as the "Millage Rollback Act," which provides that any county that imposes on itself an *ad valorem* property tax in excess of 10 mills for educational purposes will not be eligible to receive state funds to support its educational system.[1] For the school year immediately prior to the passage of the Millage Rollback Act (the school year of 1967-68), 24 Florida counties had imposed on themselves *ad valorem* property taxes in excess of 10 mills for educational purposes. As a result of the passage of the Millage Rollback Act, each of these counties reduced its school taxes to 10 mills[2] for subsequent years to avoid losing state funds for its educational system.

Appellees attack the statute as a *de facto* wealth discrimination because, although it authorizes the poorest Florida county to tax itself only $52 per pupil, it authorizes the richest Florida county to tax itself as much as $725 per pupil. This limitation is placed on the poorer counties even though they are willing to sacrifice in order to provide better school systems for their children by taxing themselves at a higher rate than richer counties do. A limitation on the tax rate a local jurisdiction may impose for educational purposes is unconstitutional, say appellees, if the limitation is fixed by reference to a standard which relates solely to the amount of property in the

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[1] The Millage Rollback Act is F.S.A. § 236.251, which provides in pertinent part as follows:

> Effective July 1, 1968, each county board of public instruction desiring to participate in the minimum foundation program for kindergartens and grades one through twelve shall levy no more than ten mills of tax on the nonexempt assessed valuation of the county, exclusive of voted district building and bus, required debt service, and the millage required for junior college minimum effort.

[2] Plus minor adjustments not here relevant.

county, rather than to the educational needs of the county. In short, a limitation based on the amount of property in the county effects a discrimination based on wealth which is unsupported even by a rational justification, and surely is not supported by a compelling state interest.[3]

The three judge district court agreed.[4] Finding it unnecessary to decide whether the rational basis test or the compelling interest test was applicable, the court found that the Millage Rollback Act had not even a rational justification. The court stated:

> What rational basis can be found for the distinctions that are inherent in the Act? . . . What interest has the State of Florida in preventing its poorer counties from providing as good an education for their children as its richer counties? . . . We have searched in vain for some legitimate state end for the discriminatory treatment imposed by the Act.
>
> While the state undoubtedly has a valid interest in preserving the fiscal integrity of its programs, and may legitimately attempt to limit its expenditures for public education, or any other purpose, it "may not accomplish such a purpose by invidious discrimination between classes of its citizens." *Shapiro* v. *Thompson*, 394 U.S. 618 (1969) [App. 15].

THE IMPORTANCE OF THE CASE

1. The importance of the decision below is emphasized by the fact that similar tax limitations exist in a large number of states. According to a 1965 study, 34 states limited the authority of local taxing units to fix tax

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[3] See *Shapiro* v. *Thompson*, 394 U.S. 618 (1969) and *McDonald* v. *Board of Election Commissioners*, 394 U.S. 802 (1969).

[4] A single judge initially dismissed the case on jurisdictional grounds. After reversal by the Court of Appeals for the Fifth Circuit (*Hargrave* v. *McKinney*, 413 F.2d 320 (1969)), the same judge joined in the ruling on the merits that the statute in issue is unconstitutional.

rates for educational purposes by reference to a specific maximum number of mills (or to a specified maximum percentage applied to assessed valuation).[5] All of these limitations are now drawn into question—and properly so.

Some states, wishing to apply a limit to taxing authority for school purposes, have done so in terms of a constitutionally permissible standard, such as a specific number of dollars per pupil.[6] However, the majority of states continue to use a standard based on the value of property in the taxing unit, despite the fact that, as the court below found, this plainly discriminates against the poorer taxing units.

Because the decision in this case will control rulings on similar statutes in so large a number of states, we believe plenary review of this issue is warranted.

2. The status of *de facto* wealth discrimination as a constitutionally invidious classification is in need of clarification by this Court.

On March 25, 1969, this Court affirmed *per curiam* on jurisdictional papers the dismissal of a complaint which charged *de facto* wealth discrimination in the school financing laws of Illinois. *McInnis* v. *Ogilvie*, 394 U.S. 322 (1969), *affirming mem.*, *McInnis* v. *Shapiro*, 293 F. Supp. 327 (N.D. Ill. 1968) (Mr. Justice Douglas would have noted probable jurisdiction). In effect, this Court in *McInnis* rejected without trial an allegation based on the contention that the Illinois school financing laws were unconstitutional because they necessarily resulted in higher

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[5] M. K. Remmlein, *Tax Limitation Laws* (National Education Association, Committee on Educational Finance, 1965), p. 9. Not all of these statutes required rollbacks, since the maximums have been in effect for far longer periods than the Florida maximum involved in this case.

[6] Remmlein, *op. cit.*, p. 9.

per pupil expenditures in wealthier districts. Whether this per curiam affirmance represents the considered view of this Court on the issue of *de facto* wealth discrimination or whether it is tantamount to a denial of certiorari is a much mooted question among scholars and the bar.[7] In any event, one month later this Court, in explicit dicta looking in precisely the opposite direction, stated that discrimination based on wealth is "highly suspect" and that when such a classification is under attack pursuant to the Equal Protection Clause it is subject to the higher standard of review which has become known as the compelling interest test. *McDonald* v. *Board of Election Commissioners*, 394 U.S. 802, 807 (1969). However, thereafter in February, 1970, the Court again affirmed *per curiam* on jurisdictional papers a case almost indistinguishable from the *McInnis* case. *Burruss* v. *Wilkerson*, 396 U.S. 44 (1970), *affirming mem.*, 301 F. Supp. 1237 (W. D. Va. 1969) (Mr. Justice Douglas and Mr. Justice White would have noted probable jurisdiction).

Of course, it is possible for a lower court to conclude that *McInnis* and *Burruss* should be limited to their facts or that such affirmances, made on sparse jurisdictional papers, must be interpreted as having been decided on the narrowest possible ground.[8] Or in particular cases such as the instant one, *McInnis* and *Burruss* may be distinguishable on their facts, as the district court found in

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[7] The *McInnis* case and its meaning are discussed in John E. Coons, et al., *Private Wealth and Public Education* (Harvard University Press, 1970) pp. 305-306, 311-315; Silard and White, "Intrastate Inequalities in Public Education: The Case for Judicial Relief Under the Equal Protection Clause," 1970 *Wis. L. Rev.* 7 (1970); Michelman, "Forward: On Protecting the Poor Through the Fourteenth Amendment," 83 *Harv. L. Rev.* 7 (1969); and Shanks, "Equal Education and the Law," 39 *American Scholar* 255 (Spring, 1970).

[8] See authorities cited in previous footnote.

this case.[9] However, we believe that this case may provide the Court with a vehicle for clarification of the status of the *de facto* wealth discrimination as a constitutionally invidious classification, while a *per curiam* affirmance of the decision below would only add to the already existing confusion and uncertainty in this area.[11]

For these reasons, we believe the Court should note probable jurisdiction.

Respectfully submitted,

GLASSIE, PEWETT, BEEBE & SHANKS

By

HERSHEL SHANKS
ALLAN I. MENDELSOHN
ROBERT M. PERCE, JR.
Federal Bar Building West
1819 H Street, N. W.
Washington, D. C. 20006

RICHARD H. FRANK
918 Marine Bank Building
Tampa, Florida 33602

Attorneys for Appellees

DAVID RUBIN
1201 Sixteenth Street, N. W.
Washington, D. C. 20006
Of Counsel

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[9] However, it may be noted that the lower court in *McInnis*, in addition to its other rulings, sustained the same kind of maximum limitation which the lower court struck down in the case at bar, 293 F.Supp. at 333, although the correctness of this ruling was not raised on appeal to this Court.

[10] See, for example, Judge Friendly's citation of the *McInnis* case in *McMillan* v. *Garlick*, — F.2d — (C.A. No. 34709, 2d Cir., decided August 3, 1970), Slip Op. 4071, n.5.

[11] Of course a *per curiam* affirmance would by its precedential force alone control decision as to the 34 states which have maximum tax limits based on property values in the taxing unit.

SUPREME COURT, U. S.

FILED
DEC 23 1970
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 573

GOVERNOR CLAUDE R. KIRK, JR., ET AL.,
Appellants,

—vs—

ROBERT H. HARGRAVE, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

BRIEF OF APPELLANTS

RIVERS BUFORD, JR.
General Counsel
State Board of Education
347 Miles Johnson Building
Tallahassee, Florida 32304

STEPHEN MARC SLEPIN
Counsel
State Board of Education
347 Miles Johnson Building
Tallahassee, Florida 32304

CHARLES E. MINER, JR.
Counsel
State Board of Education
347 Miles Johnson Building
Tallahassee, Florida 32304

Attorneys for Appellants

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IN THE

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OCTOBER TERM, 1970

No. 573

GOVERNOR CLAUDE R. KIRK, JR., ET AL.,

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

BRIEF OF APPELLANTS

OPINION BELOW

The decision of the statutory Three-Judge United States District Court for the Middle District of Florida is not reported and is printed in the Appendix at pp. 44-54.

JURISDICTION

The decision of the Three-Judge United States District Court for the Middle District of Florida was dated May 8, 1970, and was filed in the District Court for the Middle District of Florida on June 3, 1970. (Appendix pp. 44-54). The jurisdiction of the Supreme Court to review this decision and order by direct appeal is conferred by 28 U.S.C., § 1253. The following decisions, among many, sustain the jurisdiction of the Supreme Court to review the judgment and order on direct appeal in this case: *Palmetto Fire Insurance Company v. Connecticut*, 272 U.S. 295, 305; *Florida Lime and Avocado Growers, Inc. v. Jacobsen*,

362 U.S. 73, 85; *Shelton v. Tucker*, 364 U.S. 479; *Baggett v. Bullitt*, 377 U.S. 360; *Flast v. Cohen*, 392 U.S. 83.

STATUTE INVOLVED

Involved here is the constitutionality of the provisions of § 236.251, Florida Statutes. Since the inception of this action, the foregoing statute has been amended by the Florida Legislature, and the text of the statute, as amended, is printed below in pertinent part.[1]

STATEMENT OF THE CASE

The State of Florida, pursuant to constitutional authorization,[2] makes provision by law for the operation of the State of Florida public schools. Such schools are financed partially from *ad valorem* taxes collected within each school district, partially from appropriations by the state to the several school districts and partially by federal grants and other grants and donations. The amended complaint previously filed herein contains a more than adequate discourse on the methods of public school financing

[1] "236.251. Tax levy; participation in Minimum Foundation Program; limitation.

Effective July 1, 1970, each school board desiring to participate in the Minimum Foundation Program for kindergartens and grades 1-12 shall levy no more than ten mills of tax on the non-exempt assessed valuation of the district, exclusive of millage voted for: local capital improvement; required debt service, required junior college minimum effort, required additional kindergarten local effort, commissions to tax collector and tax assessor, deficit in the state funding of retirement matching, cost of liability insurance due to waiver of sovereign immunity, capital improvements under § 9 of Article VII of the state constitution, and the amount of money necessary to replace any decrease of funds from Public Law 874, decrease meaning the difference between that amount of money received by the school district during the current fiscal year and the largest amount of money received by the said district under the said law subsequent to July 1, 1967.

Section 9. Effective July 1, 1974, § 236.251, Florida Statutes, is repealed."

[2] Article IX, §1, Florida Constitution.

in Florida and it is herein and hereby adopted by appellants. (Appendix page 3 et seq.).

Under the provisions of Article VII, § 9, of the Florida Constitution, a school district may levy *ad valorem* taxes not in excess of ten mills on each dollar of assessed valuation for school purposes. That section of the Constitution also authorizes freeholders within each school district to authorize by referendum the levying of additional taxes for school purposes for periods not in excess of two years.

Appropriation of state moneys (principally derived from sales and use tax) to local school districts is authorized by Article VII, § 8, of the Florida Constitution, which provides that state funds may be appropriated to the several school districts upon such conditions as may be provided by general law.

In the 1968 Special Session of the Florida Legislature, convened to deal with educational financing in the State of Florida, provision was made for an increased allocation of state moneys to the several school districts. In view of the increased appropriation of state moneys for local school purposes and in an attempt to promote a more uniform system of *ad valorem* taxation within the several counties, the Legislature enacted § 236.251, Florida Statutes, here under attack, which established a condition, as authorized by Article VII, § 8, Florida Constitution, upon the appropriation of these state moneys to local school districts. This condition simply stated that in order to be eligible for state appropriated funds, a school district must not assess more than ten mills of *ad valorem* tax for school purposes. (There were certain minor exceptions to the ten mill limitation, but such exceptions are not really material to the issues of this case).

It should be noted at this point that the constitutional authorization for district school boards to levy up to ten

mills of *ad valorem* tax for all school purposes is not a mandate to levy any particular millage but only an authorization to levy that which is required to meet the school district's financial needs. Likewise, when the freeholders of a district authorize the imposition of a millage in excess of ten mills, such authorization again is not a mandate, but simply an authorization.

The appellees, in their various capacities as freeholders; parents or students in the public schools, filed this suit in the United States District Court for the Middle District of Florida alleging the unconstitutionality of § 236.251, Florida Statutes, because of their contention that 10 mills of *ad valorem* tax in one school district would produce fewer dollars per child for education purposes than would 10 mills of *ad valorem* tax in another county. Thus, appellees argued the state could not constitutionally impose an *ad valorem* tax limitation as a condition precedent to the receipt of state funds in aid of local education. After joinder of issues, appellants and appellees each filed motions for summary judgment. The appellees' motion for summary judgment was granted, the Court below finding the provisions of § 236.251, Florida Statutes, to be unconstitutional and enjoining the appellants from withholding state funds from local school districts which exceeded the millage limitation established by § 236.251, Florida Statutes.

During the 1970 legislative session, the Legislature amended the statute under attack as well as other statutory provisions relating to the minimum school foundation funding formula, the effect of which amendments does not serve to change substantially the statute under attack but which does serve to provide for increased state funding of the public schools in Florida.[3]

[3] Florida Statutes §§236.01-236.071 are collectively described as the Minimum Foundation Program.

QUESTIONS INVOLVED

I.

SHOULD THIS COURT ABSTAIN FROM HEARING THIS CASE IN DEFERENCE TO STATE COURT DETERMINATION OF LITIGATION PRESENTLY PENDING, THE OUTCOME OF WHICH MAY RENDER UNNECESSARY A DECISION UNDER THE FOURTEENTH AMENDMENT?

II.

DOES THE MILLAGE ROLLBACK ACT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT?

III.

SHOULD THE FLORIDA MILLAGE ROLLBACK LAW BE TESTED BY THE "RATIONAL BASIS" STANDARD OR THE "COMPELLING STATE INTEREST" STANDARD?

IV.

DID THE COURT BELOW ERR IN GRANTING SUMMARY JUDGMENT FOR APPELLEES AND INVALIDATING THE PROVISIONS OF §236.251, FLORIDA STATUTES?

ARGUMENT

I.

THIS COURT SHOULD ABSTAIN FROM HEARING THIS CASE IN DEFERENCE TO STATE COURT DETERMINATION OF LITIGATION PRESENTLY PENDING, THE OUTCOME OF WHICH MAY RENDER UNNECESSARY A DECISION UNDER THE FOURTEENTH AMENDMENT.

There is presently pending before the Circuit Court of the Second Judicial Circuit in and for Leon County, Florida, Case No. 69-932, styled *The School Board of Broward County, Florida v. Floyd T. Christian, et al.* wherein it is asserted that §236.251, Florida Statutes, is violative of certain provisions of the Constitution of the State of Florida.

Before concluding, however, that the case *sub judice* is ripe for the application of the doctrine of federal abstention, a review of the leading pronouncements of the Court in this regard might be in order.

Perhaps the most cogent interpretation of the doctrine of abstention was enunciated by the Court in the case of *City of Meridian v. Southern Bell Telephone and Telegraph Company*, 358 U.S. 639 3 Law Ed. 2nd 562, 79 S. Ct. 455 (1959), when it said:

> "Proper exercise of federal jurisdiction requires that controversies involving unsettled questions of state law be decided in the state tribunal preliminary to a federal court's consideration of the underlying federal constitutional questions . . .
>
> "Here the state law problems are delicate ones, the resolution of which is not without substantial difficulty—certainly for a federal court. In such a case, when the state court's interpretation of the statute or evaluation of its validity under the state constitution may obviate any need to consider its validity under the federal constitution, the federal court should hold its hand, lest it render a constitutional decision unnecessarily."

The abstention tests enunciated in *Meridian, i.e.*, unsettled questions of state law, the presence of federal questions and the possibility of state court determination rendering a constitutional decision unnecessary, have stood

the test of time and were only recently applied in the case of *Reetz v. Bozanich*, 397 U.S. 82 (1970). Factually, *Reetz* and the instant case are different, but procedurally they are virtually on all fours.

Reetz involved an Alaskan statute and certain regulations limiting commercial salmon fishing licensees to defined groups of persons. As here, the statute and regulations were attacked as being violative of the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution. Defendants moved to dismiss the complaint or in the alternative for a stay pending state court determination of whether the statute and regulations under attack violated provisions of the Alaska Constitution. A Three-Judge District Court denied defendants' motions and entered summary judgment for complainants.

On appeal, Mr. Justice Douglas, speaking for the Court, noted that the case was "virtually on all fours" with the Court's prior decision in *Meridian*. In vacating the judgment of the Three-Judge Court and remanding the cause, the Court reasoned:

> "A state court decision here however could conceivably avoid any decision under the Fourteenth Amendment and would avoid any possible irritant in the federal-state relationship."

Asserting that the management of fish resources was a "matter of great state concern" to Alaska, the Court seemingly added another dimension to the *Meridian* test for federal abstention, and, having done so, concluded:

> ". . . for here the nub of the controversy may be the state constitution. We think the federal court should have stayed its hand while the parties repaired to the state courts for a resolution of their state constitutional questions."

It is respectfully asserted that all the elements militating for application of the abstention doctrine as enunciated in *Meridian* and *Reetz* are present in the instant case.

The statute under attack here is also being attacked in a state court of competent jurisdiction on the grounds that it is violative of Florida constitutional provisions. No determination has as yet been made on the questions presented in that action and the matter is "unsettled" and "uncertain."

That a federal question is involved in the enactment and or operation of the statute which is the subject of this suit is clear.

Most assuredly, a finding by the state Court in the *Christian* suit that §236.251, Florida Statutes, is violative of the Florida Constitution will obviate the necessity of determining the Fourteenth Amendment question.

It goes without saying that matters of taxation, public school financing and fiscal integrity are matters of "great public concern" to Floridians. Judge Bell, in his dissenting opinion in *Hargrave I*,[1] put the real thrust of appellees' contentions into proper perspective when he said:

> "First, any known principle of comity would dictate that the legality of the statute in question be tested in the state courts. It involves the fiscal affairs of the State of Florida and goes to the heart of the taxing process. The local property tax limitation in question is only a part of the total state and local taxing scheme and legality *vel non* necessarily draws the entire taxing process into consideration. A federal court should be reluctant to interfere with the fiscal affairs of a state even by declaratory judgment."

Viewed in simplest terms, appellees in the instant action are attacking not just a tax limitation statute, but the very

[1] 413 F.2d. 320.

concept of *ad valorem* taxation. Such taxation is by definition based upon wealth, the very classification asserted by appellees herein to be repugnant to the Fourteenth Amendment. It is respectfully submitted that unless the Court is now prepared to test this most basic form of taxation by the standards inherent in the Equal Protection Clause, the decision sought by appellees with its necessary implications would reduce to shambles the fiscal integrity of all states utilizing this form of taxation.

Such a decision at this point in time is neither necessary nor desirable and it is respectfully urged that the doctrine of abstention should be applied in this case, the judgment of the Three-Judge District Court should be vacated and the matter remanded to abide the determination by the state Court of the constitutionality of §236.251, Florida Statutes.

II.

THE MILLAGE ROLLBACK ACT DOES NOT VIOLATE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

Appellees assert that the so-called Millage Rollback Law violates the Equal Protection Clause because "it fails to provide Florida children with an economically equal educational opportunity."[5] It should be noted that the statute complained of is not discriminatory on its face in that it applies a ten mill taxing limitation to all Florida counties if these counties are to continue to partake of Minimum Foundation state funding. The statute in question was amended subsequent to the institution of this action and has been reproduced earlier herein in pertinent part. (See footnote No. 1)

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[5] Plaintiffs brief in support of motion for summary judgment, p. 5, Document No. 282, Original File.

Appellees do not allege that discrimination flows from any uneven administration of this transitional equalization device (See footnote 1, Supra.) or that it is grounded on some hidden motive. Presumably then, the alleged discriminatory effect of the statute flows, if at all, from the simple socio-economic fact that not all Florida counties are on economic par whether in terms of school financing, number and quality of roads, hospitals, or any other index.

To point out the disparity in the operation of the act, appellees note that Bradford County, Florida, can raise $52.00 per pupil by applying the ten mill limitation to the assessed value of non-exempt property within its borders, while Charlotte County with a low pupil-high property value ratio can raise $725.00 per pupil in like manner.[6] By simple mathematical calculation, Bradford county would have to tax local property owners 139.4 mills in order to realize approximately the same per pupil revenue now obtainable in Charlotte County on a levy of ten mills! To ask that the property owner in Bradford tax himself into bankruptcy in order to place his child on economic par with his counterpart in Charlotte County would indeed appear to be a violation of the Equal Protection Clause because it establishes a classification based upon residence.

It is precisely because of county-to-county economic disparity that the Millage Rollback Act was enacted in 1968 as one part of a total plan to more nearly equalize economic educational opportunity for all Florida school children, regardless of residence. Its enactment was accompanied by changes in the Minimum Foundation funding formula which called for a massive infusion of state moneys into the several school districts[7] based upon educational need, admittedly a judicially unmanageable con-

[6] *Ibid.*

[7] Section 236.07, Florida Statutes.

cept. Initial results of this change in emphasis from local support of public education to increased state support are now in and will be published in March of 1971 in the Annual Report of the Commissioner of Education, Floyd T. Christian. These figures were prepared by the State Department of Education of the State of Florida and reflect the per pupil expenditure in Florida from all sources during the [redacted] school year. Because they graphically demonstrate Florida's determined effort to equalize economic educational opportunity, they are reproduced herein.

FEDERAL, STATE AND LOCAL OPERATING EXPENSE PER PUPIL 1969-1970

County	*Current Expense*	*Number of Pupils in Average Daily Attendance—Kindergarten–12th Grade*	*Current Per Pupil Operating Expense Based on Average Daily Attendance*
Alachua	13,561,338.93	20,598	658.38
Baker	1,539,480.06	2,364	651.22
Bay	10,451,925.65	16,685	626.43
Bradford	2,631,765.11	3,553	740.72
Broward	81,645,338.54	103,745	786.98
Calhoun	1,635,300.87	1,938	843.91
Charlotte	3,165,455.24	3,641	869.39
Citrus	2,784,099.53	3,161	880.77
Clay	4,930,166.86	8,282	595.29
Collier	7,867,054.27	8,046	977.76
Columbia	4,436,213.33	6,294	704.83
Dade	185,684,823.41	225,402	823.79
De Soto	1,781,298.55	2,600	685.11
Dixie	1,130,514.26	1,417	797.82
Duval	71,702,353.49	113,773	630.22
Escambia	28,860,877.10	43,161	668.68
Flagler	847,041.92	1,103	767.94
Franklin	1,123,262.01	1,548	723.62
Gadsden	6,296,868.15	10,106	623.08

County	Current Expense	Number of Pupils in Average Daily Attendance—Kindergarten–12th Grade	Current Per Pupil Operating Expense Based on Average Daily Attendance
Gilchrist	809,690.06	945	856.81
Glades	874,785.11	844	1,036.48
Gulf	2,111,752.36	2,803	753.39
Hamilton	1,741,307.00	2,199	791.86
Hardee	2,238,888.99	3,113	719.21
Hendry	1,890,251.72	2,799	675.33
Hernando	2,614,397.29	3,508	745.27
Highlands	4,212,818.36	5,834	722.11
Hillsborough	63,159,337.30	94,725	666.77
Holmes	1,856,439.15	2,557	726.02
Indian River	5,933,213.08	7,501	790.99
Jackson	5,459,278.24	8,024	680.37
Jefferson	1,952,323.60	2,692	725.23
Lafayette	602,992.20	684	881.57
Lake	10,640,057.53	14,278	745.21
Lee	13,068,940.86	18,093	722.32
Leon	14,404,339.95	19,159	751.83
Levy	2,511,033.28	3,126	803.27
Liberty	828,121.26	856	967.43
Madison	2,387,473.15	3,505	681.08
Manatee	12,354,671.61	15,883	777.86
Marion	11,150,099.01	15,194	733.85
Martin	4,007,038.92	5,331	751.65
Monroe	6,934,296.71	9,496	730.23
Nassau	3,580,601.39	5,547	645.50
Okaloosa	14,630,579.30	24,679	592.84
Okeechobee	1,857,017.09	2,706	686.26
Orange	49,629,769.24	75,622	656.29
Osceola	3,399,533.77	5,033	675.45
Palm Beach	54,502,511.53	61,727	882.96
Pasco	6,177,611.26	10,331	597.97
Pinellas	56,602,013.42	76,764	737.35
Polk	34,266,564.42	50,518	678.30

County	*Current Expense*	*Number of Pupils in Average Daily Attendance—Kindergarten–12th Grade*	*Current Per Pupil Operating Expense Based on Average Daily Attendance*
Putnam	5,922,756.76	8,956	661.32
St. Johns	4,565,986.51	6,362	717.70
St. Lucie	7,168,246.09	10,419	688.00
Santa Rosa	6,055,504.22	8,758	691.43
Sarasota	15,335,037.20	17,438	879.40
Seminole	11,083,889.59	19,014	582.93
Sumter	2,352,753.48	3,331	706.32
Suwannee	2,913,598.20	3,807	765.33
Taylor	2,594,540.54	3,694	702.37
Union	932,609.19	1,229	758.84
Volusia	23,631,299.04	30,219	729.05
Wakulla	1,369,253.65	1,553	881.68
Walton	2,572,024.91	3,685	697.97
Washington	2,474,478.06	2,864	863.99
Totals	955,826,721.98	1,312,693	Avg. 728.14

Thus, it can readily be seen that in terms of total funding, the students in the so-called "property poor" counties are not nearly as put upon as appellees assert. They will be, however, if appellees are afforded the relief they seek. To unleash the taxing power of the several school districts by striking down the Millage Rollback Law would compound and magnify the very inequities in public school financing of which appellees complain. The disparity of the tax impact per mill levied would vary so greatly between the property-poor county and the property-rich county as to truly justify a charge of "invidious discrimination", a concept roundly condemned by this Court.*

Lastly, the total financing package enacted by the Legislature in 1968 and amended in 1970 recognizes the

* See *Dandridge v. Williams*, 397 U.S. 471, *infra*.

competition among various governmental subdivisions for the tax dollar. The fiscal integrity of Florida requires an overview of all state and locally funded goods and services to insure fair apportionment of available resources among many worthy programs, including public education.

As stated by this Court in *Shapiro v. Thompson*, at 394 U.S. 618 (1969),

> "A state has a valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures whether for public assistance, public education or any other program. . . ."

It is respectfully submitted that the statute in question (1) is not unconstitutional on its face, (2) is not administered unevenly, (3) is not based on some hidden motive, (4) when viewed in context, serves to more nearly equalize educational opportunity insofar as dollar expenditure permits by restricting the otherwise untrammeled taxing power of the wealthier school districts and (5) bears a reasonable relationship to the legitimate state end of preserving fiscal integrity.

Consequently, Section 236.251, Florida Statutes, is not violative of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

III.

WHETHER THE MILLAGE ROLLBACK ACT VIOLATES THE EQUAL PROTECTION CLAUSE MUST BE DETERMINED BY REFERENCE TO THE "RATIONAL BASIS" TEST RATHER THAN THE COMPELLING STATE INTEREST TEST.

Traditionally, socio-economic regulations by a state claimed to be violative of the Equal Protection Clause have been tested by the "rational basis" standard. If a

classification has some "reasonable basis", it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality." *Lindsley v. Natural Carbonic Gas Company*, 220 U.S. 61, 78 (1911). "The problems of government are practical ones and may justify if they do not require rough accommodations—illogical it may be and unscientific." *Metropolis Theater Company v. City of Chicago*, 228 U.S. 61, 69-70, 57 L.Ed. 730, 33 S.Ct. 441 (1913). "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan v. Maryland*, 366 U.S. 420, 426 (1961).

In *McDonald v. Board of Election Commissioners*, 394 U.S. 802 (1969), the Court determined that a "challenged statute" that bears "some rational relationship to a legitimate state end" "will be set aside only if based on reasons totally unrelated to the pursuit of that goal."

Only recently, in the case of *Dandridge v. Williams*, 397 U.S. 471 (1970), the Court again applied the traditional "rational basis" test in declining to strike down a Maryland welfare regulation limiting the amount any welfare family could receive in a given month regardless of family size or need. Plaintiffs therein had alleged a Fourteenth Amendment violation because the "family size" and "need" tests were not considered by Maryland officials in allocating welfare funds to recipients.

Although noting that the "administration of public welfare assistance . . . involves the most basic needs of impoverished human beings," the Court, speaking through Mr. Justice Stewart, concluded that "we can find no basis for applying a different constitutional standard." *Dandridge, supra*, at 485.

> "And it is a standard true to the principle that the Fourteenth Amendment gives the federal courts no

> power to impose upon the states their views of what constitutes wise economic or social policy . . . the Equal Protection Clause does not require that a state choose between attacking every aspect of a problem or not attacking it at all. It is enough that the state's action be rationally based and free from invidious discrimination." *Dandridge, supra,* 485-486.

In the instant case, appellees are admittedly not attacking the rather complex formula for funding public education in Florida. They are homing in, as it were, on one of a series of provisions relating to the Minimum Foundation funding scheme presently in use in Florida and asserting that the operation of this statute denies to Florida school children an equal economic educational opportunity. Assuming *arguendo* that the Equal Protection Clause requires that every youngster is entitled to an equal economic educational opportunity (a position this Court has never taken) there has not been nor can there be made any showing that Florida school children are, in fact, discriminated against in any economic sense through the operation of the statute here under attack.

In truth and fact, §236.251, Florida Statutes, is not a funding statute at all, but simply an artificial device used to more equally adjust per pupil expenditures throughout the several school districts of Florida. It is a legitimate manifestation of Florida's concern that *ad valorem* taxpayers in each county should bear the same brunt tax impactwise per mill of tax levied in their support of the public school system. It bespeaks state concern for other worthwhile programs funded either in whole or in part from local sources, which programs compete with public education for tax dollar sustenance.

For the above and foregoing reasons, §236.251, Florida

Statutes, should be put to the "rational basis" and not the "compelling state interest" test enunciated in *Shapiro v. Thompson*,[9] although we believe it will pass muster when viewed from either vantage point.

IV.

THE THREE-JUDGE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT, MOTION OF PLAINTIFFS BELOW, AND INVALIDATING §236.251, FLORIDA STATUTES.

As asserted earlier, the Three-Judge District Court for the Middle District of Florida should have "stayed its hand" while a state Court of competent jurisdiction determined the constitutionality of §236.251, Florida Statutes, vis-a-vis the Florida Constitution, which issue is squarely presented in the *Christian* case. Had that Court done so the determination of the Fourteenth Amendment question contained in the case *sub judice* might very well have been obviated. All of the prerequisite elements to the application of the federal abstention doctrine enunciated in *Meridian* and *Reetz* are present here and this doctrine should be applied in this case.

In its decision, the Three-Judge District Court stated that the [millage rollback] "act prevents the poor counties from providing *from their own taxes* [emphasis contained in the original] the same support for public education

---

[9] 394 U.S. 618 (1969). This case involved the constitutionality of a one year residence welfare requirement. In striking down this requirement, the Court found the rationale to be an apportionment of future benefits according to past tax contributions, a classification it considered to be invidious. In doing so, the Court applied the "compelling governmental interest" test to determine whether the Equal Protection Clause had been violated. There is no similarity at all between *Shapiro* and the instant case.

which the wealthy counties are able to provide." (Appendix, p. 48)

The order below does not and cannot grant the relief requested by appellees or claimed by the Court, i.e., dollar equality per-pupil.

Act or no act, no amount of judicial wand waving is going to change the basic premise inherent in the quoted portion of the Court's opinion. Counties that are property poor in relation to their student numbers are going to stay that way and the Charlotte County types are going to retain their favored status.

Assume that there were no 10 mill cap and that rich and poor counties alike could levy millage to their heart's content. Assume also that Charlotte County added an additional five mills raising to $1,087.50 the per pupil amount that would be raised at that rate. In order for his child to achieve some semblance of economic parity with the Charlotte County child, a Bradford County *ad valorem* taxpayer-parent would have to agree to tax himself at the rate of 312 mills. The power to tax is truly the power to destroy!

The Court below concluded that Florida's Millage Rollback Act was violative of the Equal Protection Clause because there was "no rational basis" for its enactment. (Appendix p. 50) Because the Court correctly applied this traditional test and specifically declined to explore "the fundamental-right-to-an-education thesis" (Appendix p. 50) and the "compelling governmental interest" (Appendix p. 50) test set out in *Shapiro v. Thompson*, we necessarily conclude that the Court recognized that the provision under attack is socio-economic in nature and need not be tested by the "compelling governmental interest" test.

That the Court could find "no rational basis" for the en-

actment of the Millage Rollback Act bespeaks, in our view, a basic misunderstanding of either *ad valorem* taxation or public school financing in Florida. The Court indulged in an unfounded assumption when it posed the following question:

> "What interest has the State of Florida in preventing its poorer counties from providing as good an education for their children as its richer counties?" (Appendix p. 49-50)

We answer: Florida's prime educational interest is to provide as nearly equal an economic educational opportunity as possible for all of its school children regardless of residence. The state has recognized its responsibility to assume the major burden of financing public education in Florida and especially during the transitional period, as emphasis is shifted from local support to increased state support. We feel it to be fiscally sound to impose a moratorium, as it were, on local taxing authority until we are able to narrow the gap that has existed in economic educational opportunity between the several counties because of the socio-economic fact that some are property poor in relation to the number of students in the public schools and some are property rich in relation to their student population.

Lastly, the Court below has seen fit to tread in an area fraught with judicially unmanageable imponderables. It has struck down a state *ad valorem* tax limitation statute because it was related to a standard having nothing to do with the "educational needs" of the several counties. (Appendix p. 49) However, the Court did not assume the correlative judicial burden of defining "educational needs". In the two instances where cases involving the constitutionality of equalized public school expenditures have come before this Court, the Court has pointedly declined to hold

unconstitutional the state public school financing schemes involved.[10] In both of these cases, Three-Judge District Courts held in essence that the states of Illinois and Virginia were not constitutionally compelled to equalize expenditures in their school districts. This Court *per curiam* affirmed both findings of the lower Courts.

It is respectfully submitted that the sentiment expressed in the opinion of the Three-Judge District Court in the *Burruss* case seems particularly apropos as it relates to the instant case. It stated:

> "The courts have neither the knowledge, nor the means, nor the power to tailor the public moneys to fit the varying needs of these students throughout the state."

The case under consideration is no different in principle from *McInnis* or *Burruss*. The factor of "educational need" is the common tie that binds the three cases. The Three-Judge District Court should have followed the reasoning in *Burruss* and *McInnis*.

For the above and foregoing reasons it is respectfully submitted that the Three-Judge Panel below erred in granting plaintiffs' motion for summary judgment and invalidating §236.251, Florida Statutes.

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[10] *McInnis v. Shapiro*, 293 F.Supp. 327 (N. D. Ill.), aff'd. *per curiam sub nom McInnis v. Ogilvie*, 384 U.S. 382 (1969); *Burruss v. Wilkerson*, 301 F.Supp. 1237, aff'd. *per curiam* 38 U.S. LW 3310 (1970).

CONCLUSION

For the foregoing reasons this Court should reverse and remand.

Respectfully submitted,

RIVERS BUFORD, JR.
General Counsel
State Board of Education
347 Miles Johnson Building
Tallahassee, Florida 32304

STEPHEN MARC SLEPIN
Counsel
State Board of Education
347 Miles Johnson Building
Tallahassee, Florida 32304

CHARLES E. MINER, JR.
Counsel
State Board of Education
347 Miles Johnson Building
Tallahassee, Florida 32304

SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 573

GOVERNOR RUBEN ASKEW, successor to and substituted for Governor Claude R. Kirk, Jr., ET AL., *Appellants*,

v.

ROBERT H. HARGRAVE, ET AL., *Appellees*.

On Appeal From the United States District Court for the Middle District of Florida

BRIEF FOR APPELLEES

GLASSIE, PEWETT, BEEBE & SHANKS
By
HERSHEL SHANKS
ALLAN I. MENDELSOHN
ROBERT M. PERCE, JR.
Federal Bar Building West
1819 H. Street, N. W.
Washington, D. C. 20006

RICHARD H. FRANK
918 Marine Bank Building
Tampa, Florida 33602
Attorneys for Appellees

DAVID RUBIN
1201 Sixteenth Street, N. W.
Washington, D. C. 20006
Of Counsel

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 573

GOVERNOR RUBEN ASKEW, successor to and substituted for Governor Claude R. Kirk, Jr., ET AL., *Appellants*,

v.

ROBERT H. HARGRAVE, ET AL., *Appellees*.

On Appeal From the United States District Court for the Middle District of Florida

---

BRIEF FOR APPELLEES

OPINIONS BELOW

The opinion of the three-judge district court from which this appeal is taken is reported at 313 F. Supp. 944 (App. 44-54). This suit was initially dismissed by a single district judge, whose order is contained in footnote 2 to the opinion of the Fifth Circuit rendered on appeal from the order of dismissal. *Sub nom.*, *Hargrave* v. *McKinney*, 413 F.2d 320, n. 2. The opinion of the Court of Appeals for the Fifth Circuit re-

versing the single judge's dismissal of the complaint and ordering the convening of a three-judge court is, as indicated above, reported at 413 F.2d 320. Chief Judge Brown wrote an additional opinion specifically ordering the convening of a three-judge court in this case. That opinion is reported at 302 F. Supp. 1381.

JURISDICTION

The judgment of the three-judge district court was entered on May 8, 1970 (App. 53). Notice of appeal was filed on June 3, 1970 (App. 55-56). Appellants' Jurisdictional Statement was filed on August 21, 1970. Probable jurisdiction was noted on November 9, 1970. The jurisdiction of this Court rests on 28 U.S.C. § 1253.

QUESTION PRESENTED

A Florida statute known as the Millage Rollback Act provides that any Florida county that imposes on itself more than 10 mills *ad valorem* property taxes for educational purposes will not be eligible to receive state funds for the support of its public education system.

The question presented is whether the Millage Rollback Act violates the equal protection clause of the Fourteenth Amendment as a discrimination based on wealth, because it distributes taxing authority for educational purposes by a standard related solely to the wealth of the county (i.e., the value of the property in the county), and in effect allows the wealthiest Florida county to tax itself up to $725 per pupil without losing state support for its public education system, while limiting the poorest Florida county to $52 per pupil on pain of losing state support for its public education system.

STATUTE INVOLVED

The Millage Rollback Act, Section 23, Chapter 68-18 Florida Laws, enacted at the Extraordinary Session of 1968 of the Florida Legislature, provides in pertinent part as follows:

> Effective July 1, 1968, each county board of public instruction desiring to participate in the minimum foundation program for kindergartens and grades one through twelve shall levy no more than ten mills of tax on the non-exempt assessed valuation of the county, exclusive of voted district building and bus, required debt service, and the millage required for junior college minimum effort.

The text of the entire statute as enacted is set forth in Appendix A hereto. Since the decision of the three-judge court, the Millage Rollback Act has been amended in respects not relevant to this litigation. In Appendix B we have set forth the text of the Millage Rollback Act, now F.S.A. § 236.251, showing, by brackets and italics, the act as originally enacted and as amended.

STATEMENT

This suit attacks, under the equal protection clause of the Fourteenth Amendment, the constitutionality of a Florida statute (the "Millage Rollback Act") which provides that any county imposing on itself more than 10 mills in *ad valorem* property taxes for educational purposes will not be eligible to receive state funds for the support of its public education system. Appellees[1] (plaintiffs below) seek to enjoin appel-

[1] Appellees are parents, taxpayers and students from 16 Florida counties which have been adversely affected by the Millage Rollback Act, i.e., which have been forced by the Act to reduce their tax rates in order to avoid losing state support for their education system.

lants[2] (defendants below) from withholding state education funds from any county because it taxes itself in excess of the limit imposed by the Millage Rollback Act.

Appellees contend that the Millage Rollback Act draws an impermissible line based on wealth, allowing, as it does, the imposition of $725 per pupil of education taxes in Florida's wealthiest county and only $52 per pupil in Florida's poorest county. Thus the Act prevents a poor county from providing as good an education for its children as the wealthier counties provide even if the poor county is willing to sacrifice to reach this goal by imposing on itself a higher education tax rate than is imposed in wealthier counties.

Prior to the passage of the Millage Rollback Act, 24 Florida counties had imposed on themselves taxes for the 1967-68 school year in excess of 10 mills. The Millage Rollback Act, passed in February 1968,[3] required each of these counties to reduce its school taxes to 10 mills[4] for subsequent years if it was to avoid losing state funds. Accordingly, for the 1968-69 school year, each of these 24 counties did reduce its taxes for

[2] Appellants are members of the State Board of Education, the State Commissioner of Education, and the State Comptroller. The State Board of Education and the State Commissioner of Education compute the amount of money each county is to receive from the state. They do this according to an elaborate formula which is part of the state's Minimum Foundation Program. The Comptroller actually distributes the money to the counties. (See Amended Complaint, paragraph 4, App. 4).

[3] And amended in respects irrelevant to this lawsuit in 1970. See Appendix B.

[4] Plus certain minor adjustments known as "DB&B", to be subsequently discussed.

educational purposes to the 10-mill limit imposed by the Act.

Appellees' position below and here is that this limit on the authority of counties to tax themselves for educational purposes violates the equal protection clause because the limitation is fixed by reference to a standard which relates solely to the amount of property in the county (i.e., wealth), not to the educational needs of the county. Counties with high property values in relation to their school population are authorized by the state to tax themselves far more in relation to their educational needs than counties with low property values in relation to their school population.[5] We argue that to limit the extent to which a county may tax itself to provide for its educational needs by reference to the amount of property in the county, which amount is wholly unrelated to the educational needs of the county, surely promotes no compelling state interest; and lacks even a reasonable basis.

In a unanimous opinion invalidating the Florida statute, Circuit Judge Dyer stated:

> What apparently is arcane to the defendants is lucid to us—that the [Millage Rollback] Act prevents the poor counties from providing *from their own taxes* the same support for public education which the wealthy counties are able to provide.
>
> . . . .

[5] Thus, Charlotte County may raise by its own taxes $725 per student, while Bradford County is permitted by the State to raise only $52 per student. See Column 10 of Exhibit D to the Amended Complaint (App. 25-26)). This variation stems from the fact that the tax base per child varies from $5,239 in Bradford County to $72,535 in Charlotte County (see Column 12 of Exhibit D to the Amended Complaint (App. 25-26)).

> What rational basis can be found for the distinctions that are inherent in the Act? Do they have any rational relationship to a legitimate state end or are they based on reasons totally unrelated to the pursuit of that goal? What interest has the State of Florida in preventing its poorer counties from providing as good an education for their children as its richer counties? As postulated by the plaintiffs, "The legislature says to a county, 'You may not raise your own taxes to improve your own school system, even though that is what the voters of your county want to do.'" We have searched in vain for some legitimate state end for the discriminatory treatment imposed by the Act.
>
> While the state undoubtedly has a valid interest in preserving the fiscal integrity of its programs, and may legitimately attempt to limit its expenditures for public education, or any other purpose, it "may not accomplish such a purpose by invidious discrimination between classes of its citizens." *Shapiro v. Thompson*, 394 U.S. 618, 633, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969) [313 F. Supp. at 947, 948; App. 48, 49-50; emphasis in original].

A. The Background: Financing Public Education in Florida

Florida provides financial support for the operation of its public schools in two ways.[6] The first source is Minimum Foundation Program funds which are appropriated by the state from state-wide taxes and distributed to each county according to a somewhat

---

[6] Amended Complaint, paragraph 5 and 6, App. 4-6. The answer (App. 27-28) admits substantially all of the factual allegations of the Amended Complaint and the allegations relating to the legal background of educational financing in Florida. References to the Amended Complaint may therefore be taken to be references to allegations which have been admitted. Appellants in their brief (Br. 2-3) specifically adopt the complaint's description of Florida's method of financing public education.

complicated formula. This formula is based on, and varies with, certain indices of the educational needs of the particular county[7] and is, accordingly, not here under attack.[8]

The second source of funds for the support of public education in Florida is local, as opposed to statewide, taxation.[9] Local taxes are of two kinds. The first is so-called "County Millage", and the second is so-called "District Millage."[10] County Millage, which may be levied up to a maximum of 10 mills, is imposed by the School Board without prior voter authorization. District Millage, on the other hand, is subject to no maximum limit provided it is first authorized, for no

---

[7] Amended Complaint, paragraphs 5, 8-11, App. 4-10.

[8] Briefly, the Minimum Foundation Program as a whole is a body of rules for calculating the total cost of funding a minimal educational system in the county (F.S.A. §§ 236.01-236.071). The total cost of a Minimum Foundation Program for each county is determined by reference to the number of Instruction Units of which the county public educational system is comprised. Instruction Units, in turn, are based on a number of factors indicative of educational need, but primarily on the number of students in average daily attendance (F.S.A. § 236.04). From the resulting amount, there is deducted a certain minimum sum which each county is expected to raise for itself if it wishes to receive so-called MFP funds from the state (F.S.A. § 236.07(10)). After the deduction of this minimum sum, the remainder is the amount of MFP funds which the state allocates to each county (F.S.A. § 236.07(10)). As a practical matter, each Florida county has taxed itself in excess of the minimum sum which is required if a county is to be eligible for MFP funds (See Exhibit C to Amended Complaint, App. 23-24). This is so because each county must expend more than the amount of a Minimum Foundation Program in order to provide an even colorably decent education for its children (Amended Complaint, paragraph 12, (App. 10)).

[9] Amended Complaint, paragraph 6, App. 5-6.

[10] *Ibid.*

more than two years at a time, by a vote of the freeholders paying taxes.[11] To the extent authorized, it may then be imposed by the School Board. Both County Millage and District Millage are provided for in the Florida Constitution.[12]

The qualified voters in each county thus vote for District Millage every two years (F.S.A. § 236.31),

---

[11] The provision of the Florida Constitution limiting the franchise to freeholders is obviously unconstitutional. *Kramer* v. *Union Free School District*, 395 U.S. 621 (1969); *Cipriano* v. *City of Houma*, 393 U.S. 1061 (1969); *Phoenix* v. *Kolodziejski*, 399 U.S. 204 (1970); *Parish School Board St. Charles* v. *Stewart*, 39 U.S.L.W. 3199 (decided November 9, 1970). However, this provision is not under attack here.

[12] County Millage is authorized in Fla. Const. Art. VII § 9 (as amended 1968) which provides in pertinent part:

> (a) Counties, school districts, and municipalities shall . . . be authorized . . . to levy ad valorem taxes . . . for their respective purposes . . .
>
> (b) Ad valorem taxes . . . shall not be levied in excess of the following millages upon the assessed value of real estate and tangible personal property: . . . for all school purposes, ten mills . . .

Article XII, Section 8 of the prior Constitution (which was in force when the original complaint was filed) provided for County Millage in the following terms:

> Each county shall be required to assess and collect annually for the support of the public free schools therein, a tax of not less than three (3) mills, nor more than ten (10) mills on the dollar on all taxable property in the same.

The 1968 Constitution makes no provision for a 3 mill minimum. As to District Millage, the relevant portion of Fla. Const. Art. VII § 9 (as amended 1968) provides:

> (b) Ad valorem taxes, *exclusive of taxes levied for . . . periods not longer than two years when authorized by vote of the electors who are the owners of freeholds* . . . shall not

thereby authorizing District Millage at a specific maximum rate for the ensuing two-year period. These elections are held in odd-numbered years (*ibid.*). While the voters authorize District Millage for a two-year period, the extent to which District Millage is actually levied is determined by the School Board after consideration of its budgetary needs for the particular

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be levied in excess of [specified limits] . . . . [Emphasis supplied.]

The implication of the italicized portion is that *ad valorem* taxes for less than two years may, when authorized by the vote of freehold electors, be levied in any amount.

The analogous provision in the pre-1968 Constitution was Article XII, Section 10 which provided:

> The Legislature . . . may provide for the levying and collection of a district school tax, for the exclusive use of public free schools within the District whenever a majority of the qualified electors thereof that pay a tax on real or personal property shall vote in favor of such levy; Provided, that any tax authorized by this section shall not exceed 10 mills on the dollar in any one year on the taxable property of the district.

The 1968 Constitution sets no upper limit on the millage which can be authorized to be levied in this way.

Although in the pre-1968 Constitution, County Millage was imposed by the county and District Millage was imposed by the school tax district, the latter was by statute co-extensive with the boundaries of the county. See F.S.A. § 230.34(1). The substance of this statute is now included in the 1968 Constitution "Each county shall constitute a school district . . . ." Fla. Const. Art. IX § 4(a) (as amended 1968).

It should also be noted to round out the picture that the state legislative authorization which the *old* constitution required before District Millage could be voted on was given by F.S.A. § 236.33 which establishes procedures for the conduct of district millage elections.

school year involved (F.S.A. § 236.33).[13] Depending on those needs, the School Board may or may not exhaust the full authority to tax which is given to it by the voters.

In addition to state and local contributions to public education, the federal government also makes a contribution to public education in Florida of approximately 2 or 3 percent.[14]

B. The Millage Rollback Act and Its Effect

In its Extraordinary Session of 1968, the Florida legislature enacted into law Chapter 68-18, Florida Statutes. Section 23 of that law dictates that no county may receive its share of state MFP funds if its School Board levies more than 10 mills (plus certain adjustments) of local tax on the non-exempt property in the county.

In pertinent part, Section 23 provides as follows:

> *Effective July 1, 1968, each school board desiring to participate in the minimum foundation program for kindergartens and grades one through twelve shall levy no more than ten mills of tax on the non-exempt assessed valuation of the district,* exclusive of voted district building and bus, required debt service, and the millage required for junior college minimum effort.

From the italicized portion of the statute, it can be seen that the prohibition of the Rollback Act means that District and County Millages in any Florida Coun-

[13] See also Affidavit of Lee Young submitted in support of plaintiffs' motion for summary judgment (App. 37-39), hereinafter Young Affidavit.

[14] See Exhibit A to Amended Complaint, App. 19-21.

ty may not, in the aggregate, exceed the 10-mill limit, plus certain minor additional authorizations contained in the unitalicized portion of the Act. These additional authorizations, sometimes referred to as DB&B, are explained in a footnote.[15] As a practical matter, they add as much as 1.5 mills to the basic 10-mill ceiling.[16] However, as the court below noted, "Funds [for DB&B] are not involved in, nor are they material to, a determination of this cause" (App. 46). In short, while the Florida Constitution permits 10 mills to be levied as County Millage and an additional unlimited number of mills to be levied (for periods not longer than two years) as District Millage, the Rollback Act limits the aggregate levy of both to only 10 mills.

For the 1967-1968 school year, prior to the passage of the Millage Rollback Act, Florida counties had imposed on themselves between 4 mills (Liberty County) and 17 mills (Pinellas County) of taxes, both County Millage and District Millage.[17] Obviously any county which imposed more than 10 mills had the authorization of its voters to impose at least that much additional

[15] The unitalicized part of the statute refers to statutes pursuant to which counties are required to raise by taxation additional moneys for district building and bus funds (F.S.A. § 237.13), for required debt service on school bond issues (F.S.A. §§ 236.29 and 236.53), and for the county share of junior college support funds (F.S.A. § 230.761(2)). In 1970 the Florida legislature also excepted from the 10-mill limit millage certain other minor amounts. See Appendix B. However, as appellants point out, "[S]uch exceptions are not really material to the issues of this case" (Br. 3).

[16] See Column 2b of Exhibit D to the Amended Complaint, App. 25-26.

[17] See Column 1 of Exhibit D to Amended Complaint, App. 25-26.

millage. The voters in 24 counties had authorized their School Board to impose District Millage in addition to the 10 mills of County Millage.

Although the voted biennial additional authorization in these 24 counties applied to the 1968-69 school year, each of these 24 counties nevertheless rolled back its millage for the 1968-69 school year in order to avoid losing state MFP funds under the terms of the Millage Rollback Act. In effect, all of these counties heeded the warning of the Millage Rollback Act which says to them, "The State will provide substantial assistance for your local education system on condition that you do not provide too much money yourself. If you do provide for yourself more than we think you should, we will not give you any state MFP money. And the standard by which you must limit yourself is based not on your educational need nor on the priority which you place on education, but only on the amount of property (i.e., wealth) in your county."

The effect of the Millage Rollback Act in 1968-69 was to reduce sharply the amount of money which local counties could raise for themselves. Measured by the reduction in millage from the year preceding the enactment of the Millage Rollback Act (1967-68), the loss was well in excess of $50,000,000. A breakdown of this amount is contained in the following memorandum dated January 6, 1969, prepared by defendant Floyd T. Christian, Commissioner of Education:[18]

[18] Our figures differ somewhat from Dr. Christian's (See Column 10 of Exhibit 1 to Young Affidavit, App. 40-41), but the precise amount is unimportant. Dr. Christian's Memorandum appears as Exhibit 1 to Affidavit of Hershel Shanks submitted in support of plaintiffs' motion for summary judgment (App. 30-31), hereinafter "Shanks Affidavit".

The following counties have enforced millage reductions in 1968-69:

County	1967-68 Operating Millage	1968-69 Operating Millage	Enforced Millage Decrease	Approximate Dollar Reduction
Alachua	13.0	10.60	2.40	$ 802,517
Brevard	14.88	11.29	3.59	2,921,310
Broward	10.67	10.24	.43	1,312,304
Collier	11.45	10.00	-0-*	
Columbia	11.729	10.00	1.729	135,953
Dade	12.32	10.28	2.04	12,812,703
Dixie	14.874	10.8737	4.0003	77,867
Duval	15.8963	10.6701	5.2262	8,899,894
Escambia	13.183	10.00	-0-*	
Gadsden	15.50	10.45	5.05	343,313
Gulf	13.30	10.59	2.71	108,410
Hernando	12.868	10.00	2.868	235,342
Hillsborough	14.206	10.00	4.206	6,609,052
Leon	11.762	10.00	1.762	635,173
Manatee	12.00	10.46	1.54	485,479
Nassau	12.42	10.86	1.56	114,887
Orange	14.80	10.40	4.40	5,343,076
Pasco	11.425	10.00	1.425	263,289
Pinellas	17.00	10.65	6.35	9,481,993
Putnam	14.271	11.47	2.801	354,447
Seminole	12.75	10.44	2.31	549,573
Taylor	11.6196	10.2593	1.3603	90,050
Volusia	14.65	10.8936	3.7564	2,449,349
Walton	12.00	11.00	1.00	48,930
				$54,074,911

* Freeholders voted zero district millage for 1968-69 and 1969-70.

Dr. Christian also notes in his memorandum:

> The effect of the ten-mill limitation creates a restriction on the amount of local support which certain counties can provide for the educational program.
>
> The expression of the freeholders in the local millage election is being negated in those cases where there is a desire to provide a greater amount of local support for the education program [App. 32].

The precise effect of the Millage Rollback Act varies considerably from county to county. In some counties, it merely prevents the county from improving its educational system to the extent its voters have authorized. In at least one county, however, the School Board had difficulty even preparing a budget. On August 15, 1969, the Superintendent of the Broward County Schools wrote Dr. Christian as follows:

> The Board of Public Instruction of Broward County, meeting in regular session on August 14th, passed a resolution stating that the Board can not balance its budget for the 1969-70 school year without exceeding the 10-mill cap imposed by the last legislature.
>
> It is impossible for us to submit a budget unless your office agrees that we may include millage funds exceeding 10-mills. Will you please advise us immediately whether or not a budget prepared which includes funds exceeding 10 mills will be accepted by your office.[19]

Dr. Christian's reply is as follows:

> In response to your letter of August 15 in which you presented the dilemma the District School Board in Broward County faces in developing an adequate school budget for 1969-70 in light of the

[19] Exhibit 2 to Shanks Affidavit, App. 33.

limitations of the 10-mill cap, the following information submitted.

> The responsibilities of this office in executing the statutes currently in existence would not permit a budget to be officially approved which included a levy of ad valorem tax in excess of those levies authorized in Section 236.251, Florida Statutes. Therefore, the Annual School Budget for 1969-70 must be developed to comply with this restriction if the district is to continue participation in the Minimum Foundation Program for Kindergarten and Grades 1-12.
>
> I recognize the severe financial difficulties which have resulted from recently enacted statutory provisions, however, there were no alternatives or discretionary authorities provided this office in administering the state and local funds for support of public schools.[20]

C. The Procedural History of This Case

The complaint in this case was filed October 31, 1968. (App. 1). Thereafter, on December 13, 1968, a single district judge granted the defendants' motion to dismiss on jurisdictional grounds without ruling on the substantiality of the merits of plaintiffs' constitutional claim (App. 1; see *Hargrave* v. *McKinney*, 413 F.2d 320, n. 2 (5th Cir. 1969)).

On appeal, the Fifth Circuit reversed the District Court's jurisdictional rulings, and then faced the question whether plaintiffs had presented a substantial constitutional claim. The Court of Appeals held that the complaint did in fact present a substantial constitutional question. *Hargrave* v. *McKinney*, 413 F.2d 320 (5th Cir. 1969). But, since that Court had no jurisdiction to pass on the merits, it refrained from ex-

[20] Exhibit 3 to Shanks Affidavit, App. 34-35.

pressing any views thereon, and remanded with directions to convene a three-judge district court.

After plaintiffs filed an amended complaint, adding certain additional defendants and deleting a prayer to require the collection of back taxes (App. 3-26), defendants filed an answer admitting substantially all of the factual allegations of the amended complaint, as well as its description of the legal background of financing public education in Florida (App. 27-28). Promptly thereafter, both plaintiffs and defendants filed cross-motions for summary judgment (App. 35-36, 43).

In a unanimous opinion carefully analyzing the constitutional violation, the three-judge district court granted plaintiffs' motion and denied defendants' motion (App. 44-54). This appeal followed (App. 55-56).

SUMMARY OF ARGUMENT

I

The Millage Rollback Act, together with other Florida statutes, authorizes Florida counties to tax themselves for a portion of the money required to support their public education systems, but limits this authority by a standard based on the value of the property in each county. We believe that this kind of limitation violates the equal protection clause. Such a limitation is just as unconstitutional as a system which would make the amount of the state education appropriation to each county—rather than the amount of taxing authority—depend on the value of the property within each county.

In our more detailed analysis, we first ask whether our equal protection claim should be reviewed pursuant to the "compelling interest" test or the "reasonable basis" test. We argue that the "compelling interest" test is applicable because the Millage Roll-

back Act allocates authority to tax on the basis of wealth. Our conclusion that the "compelling interest" test must be applied here is reinforced by a consideration of the governmental benefit in connection with which the distinction is drawn—namely, the allocation of educational resources. Surely the "compelling interest" test is applicable to a discrimination based on wealth in the allocation of educational resources.

The Millage Rollback Act not only fails to meet the "compelling interest" test, but lacks even a reasonable basis. Appellants attempt to justify the Millage Rollback Act on the ground that a limitation on the local tax rate was the necessary political price that had to be paid for an increase in state education funds. Such a justification will not pass constitutional muster. Florida may limit its expenditures for public schools, but not by a standard related to the wealth of the local community; and it offers no saving grace that this unconstitutional tax limitation was tied to an increase in state funds for education. This is especially so because of the many alternative methods that are easily available for limiting educational expenditures that are *not* tied to an unconstitutional wealth standard.

II

Abstention would be inappropriate in this case. First, there is no uncertainty in the state statute under attack which might modify or avoid the federal constitutional question; the Millage Rollback Act speaks with utter clarity. Second, the possibility of obtaining relief in a state court on state-law grounds is not a sufficient predicate for an abstention order, certainly in a case, like the instant one, brought under 42 U.S.C. § 1983. *Monroe* v. *Pape*, 365 U.S. 167 (1961); *McNeese* v. *Board of Education*, 373 U.S. 668 (1963). Appellants reliance on *Reetz* v. *Bozanich*, 397 U.S. 82

(1970), is misplaced. *Rectz*, unlike the instant case, was not based on Section 1983. Moreover, the recent case of *Wisconsin* v. *Constantineau*, decided January 19, 1971, suggests that *Rectz* must be read only as reaffirming the rule that an uncertainty in the statute under attack will lead to abstention, a principal which does not apply here. In addition, the result in *Rectz* may well be accounted for on the ground that the plaintiffs there pressed their state-law claim in the federal court, side by side with their federal constitutional claim. Here appellees have pressed only their federal claim. Moreover, appellants have not even identified the state-law ground on which they contend appellees might obtain relief.

ARGUMENT

I. THE MILLAGE ROLLBACK ACT VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

A. An Analysis of the Equal Protection Violation

The Millage Rollback Act classifies counties according to the size of their tax bases, and by this standard limits the authority of counties to tax themselves for educational purposes.[21] Such a classification is wholly

[21] The fact that Florida does not make its millage limitation an absolute prohibition, but instead conditions state MFP aid on compliance with the millage limitation, is constitutionally irrelevant. The doctrine that government may not grant a benefit or privilege on conditions requiring the recipient to relinquish his constitutional rights is well established. See, e.g., *Shapiro* v. *Thompson*, 394 U.S. 618, 627, n. 6 (1969); *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 894 (1961); *Sherbert* v. *Verner*, 374 U.S. 398, 404 (1963); *Speiser* v. *Randall*, 357 U.S. 513, 519-20 (1958); *Garrity* v. *New Jersey*, 385 U.S. 493, 499-500 (1967); *Chew* v. *Colding*, 344 U.S. 590, 597-598 (1953); *Frost and Frost Trucking Co.* v. *Railroad Comm'n*, 271 U.S. 583, 593-594 (1926). See Van Alstyne, "The Demise of the Right-Privilege Distinction in Constitutional Law," 81 Harv. L. Rev. 1439, 1445-54 (1968); Comment, "Another Look at Unconstitutional Conditions," 117 U. Pa. L. Rev. 144 (1968).

unrelated to the purpose for which the state authorizes its counties to tax themselves—to educate Florida children.

The arbitrary nature of the Millage Rollback Act may be highlighted by comparing it to a hypothetical case. Let us suppose that the State of Florida passed a statute by which state funds for the support of public education were appropriated to each county on the basis of the value of the property in that county. Let us further suppose that the statute provided for an appropriation to each county equal to 1% of the county's tax base for the previous year. Thus, County A with a tax base of $500 million would get $5 million to operate its school system, while County B with a lower tax base of $100 million would get only $1 million. Unquestionably this hypothetical legislation would be unconstitutional.[22] The Millage Rollback Act is just as clearly unconstitutional. Instead of appropriating money on an unconstitutional basis, the Rollback Act appropriates authority to the counties to tax themselves for the support of their public schools—and does so on the same unconstitutional basis. Put another way, instead of merely appropriating state money to the county in an amount determined by a fixed percentage of the property value in the county, the Rollback Act places a limitation or ceiling on the "appropriation" of a county to itself. A limitation or ceiling is imposed on the percentage (millage) which a county,

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[22] *Cf.* the language of the Supreme Court in *Shapiro v. Thompson*, 394 U.S. 618, 632-33 (1969):

> [Appellants' argument] would permit the state to apportion all benefits and services according to past tax contributions of its citizens. The Equal Protection Clause prohibits such an apportionment of state services.

by its *own* taxation, may apply to its *own* tax base to raise money for purposes of public education. The Millage Rollback Act thus involves precisely the same unconstitutional basis as is involved in the hypothetical case. For under both the amount of revenue which may be produced for education is determined by reference to a wholly arbitrary standard, namely the amount of property in the county, not the educational needs of the county.[23]

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[23] We have used the concept of "educational needs" here to include all constitutionally valid standards by which Florida might decide to allocate authority to tax. Florida's range of choice is indeed wide. It could allocate, for example, on the basis of dollars per pupil, though this is by no means the only constitutionally valid standard. It could also allocate by taking into account the numerous other factors which Florida has already incorporated into the concept of Instruction Units as used in its MFP program. See footnote 8, *supra*, p. 7. The standard could also consider the county's willingness to adopt special instruction and guidance programs, special problems of urban schools, the dispersion of students within a district, special educational problems that result because a system is very large or very small, etc. In short, any standard related to the county's "educational needs." We characterize this extensive constitutionally permissible area, which does not use wealth as a basis of allocation, as a standard based on "educational needs." See Coons, Clune and Sugarman, *Private Wealth and Public Education* (1970); Shanks, Book Review, 84 Harv. L. Rev. 257, 259-260. The vice of the present standard is that it is based on wealth. The state may *not* use wealth as a standard for allocating authority to tax.

Our use of the concept of "educational needs" here is in sharp contrast to the use of that concept in *McInnis* v. *Ogilvie*, see *infra*, p. 53. In *McInnis*, the plaintiffs sought to obtain an order from the court allocating educational resources according to individual students' educational needs. Unlike the *McInnis* plaintiffs, we do not contend that the state must affirmatively allocate educational resources on the basis of some single, though undefined standard of educational need. Our argument is a negative one;

B. The Choice of a Standard of Review

Following this Court's approach in *Shapiro* v. *Thompson*, 394 U.S. 618 (1969), we shall first consider whether the standard of review of the equal protection claim presented here should be the "reasonable basis" test or the more exacting "compelling interest" test.[24] Again following *Shapiro* v. *Thompson*, we shall do so even though we contend that the distinction drawn by the statute under attack here does not meet even the "reasonable basis" test.[25]

In determining which test is applicable—and indeed in determining whether or not the distinction drawn by

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however the allocation is made. It may not be made on the basis of wealth. For the *McInnis* plaintiffs "educational need" was a single undefined standard which was constitutionally required; for us "educational need" is that large area of discretion which is constitutionally permitted in the allocation of educational resources, so long as such resources are not allocated on the basis of wealth or other invidious distinction.

[24] In *Shapiro* v. *Thompson*, the Court chose to elaborate the so-called "compelling interest" test in greater detail than had ever previously been done, even though this was not necessary to the decision inasmuch as the Court found that the distinction drawn in that case did not satisfy the "reasonable basis" test. The logical reason for the discussion of the "compelling interest" test in *Shapiro* was to provide guidance to the bench and bar regarding the applicable standards of review in equal protection cases, and, in fact, the discussion in *Shapiro* has had far-reaching significance in delineating the parameters of subsequent equal protection problems.

[25] The court below found that the Millage Rollback Act did not meet even the "reasonable basis" test. It did not reach the question as to whether the "compelling interest" test was applicable.

> Having concluded that there is no rational basis for the distinction which the legislature has drawn, . . . we do not reach the more exacting "compelling interest" approach [App. 50].

the statute meets the applicable test—it is necessary to focus on two factors: (1) The differentiating classification,[26] and (2) the nature of the benefit or burden which is being differentially distributed by government, depending on the way a party is classified under the first factor. In the case at bar, the differentiating classification is wealth. In other cases it has been length of residence (which restricted the right to travel) (*Shapiro* v. *Thompson, supra*), race (*Brown* v. *Board of Education*, 347 U.S. 483 (1954)), or ownership of property (*Kramer* v. *Union Free School District*, 395 U.S. 621 (1969)). The benefit being differentially distributed here is taxing authority for educational purposes, the amount of which is dependent upon the wealth of the county. In other cases the benefit or burden differentially distributed has been the franchise (*Harper* v. *Virginia State Board of Commissioners*, 383 U.S. 663 (1966)), the opportunity to appeal a criminal conviction (*Griffin* v. *Illinois*, 351 U.S. 12 (1956)), or the receipt of welfare payments (*Shapiro* v. *Thompson, supra*)).

We believe that the "compelling interest" test is applicable here simply because the differentiating classification is wealth. However, it is clear beyond doubt that the "compelling interest" test is applicable where, as here, wealth is used as the basis for differentially distributing authority to tax for educational purposes. The following two sections of our brief are devoted to demonstrating these two propositions.

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[26] The phrase is Mr. Justice Harlan's. *Harper* v. *Virginia State Board of Elections*, 383 U.S. 663, 681 (dissenting opinion). Coons et al. have referred to the same concept as "the classifying fact". Coons, Clune and Sugarman, *Private Wealth and Public Education* (Harvard University Press 1970), p. 342.

C. The "Compelling Interest" Test Is Applicable Because the Millage Rollback Act Classifies Counties According to Wealth

In *McDonald* v. *Board of Election Commissioners*, 394 U.S. 802 (1969), decided a week after *Shapiro* v. *Thompson*, *supra*, this Court discussed the kinds of cases to which the "compelling interest" test is applicable. This discussion makes clear that a classification based on wealth will, in and of itself, render governmental action predicated on that classification subject to the more stringent standard of review of the "compelling interest" test. The Court's analysis in *McDonald* followed the same steps it had taken the week before in *Shapiro*, first considering which standard of review was applicable, and then considering whether the facts presented met the applicable test. The Court stated:

> Before confronting appellants' challenge to Illinois' absentee [voting] provisions, we must determine initially how stringent a standard to use in evaluating the classifications made thereunder and whether the distinctions must be justified by a compelling state interest . . . . [A] careful examination on our part is especially warranted where lines are drawn on the basis of *wealth* or race, *Harper* v. *Virginia Board of Elections*, [383 U.S. 663 (1966)] *two factors which would independently render a classification highly suspect and thereby demand a more exacting judicial scrutiny. Douglas* v. *California*, 372 U.S. 353 (1963); *McLaughlin* v. *Florida*, 379 U.S. 184, 192 (1964) [394 U.S. at 806-07; emphasis supplied].

The Court's citation to the *Harper* and *Douglas* cases indicated its view that these cases involved discriminations based upon wealth and that for this reason the Court applied the more stringent "compelling interest" test. While we agree that the Court exercised a more

exacting judicial scrutiny in these cases, we are not as clear as the *McDonald* Court appears to have been that *Harper* and *Douglas* did indeed involve wealth discrimination in the narrowest meaning of the term,[27] i.e., wealth as opposed to a discrimination based on ability to pay. Because the case at bar does involve a wealth discrimination in its narrowest meaning, we believe our case is even stronger than *Harper* and *Douglas*.

In *Harper* and *Douglas* the Court had under review classifications which were based, strictly speaking, not on wealth, but on ability to pay (or on payment of a fee). The effect, of course, may be the same regardless of whether the discrimination is based on wealth or ability to pay.[28] The poor person frequently does not have the ability to pay. However, for purposes of legal theory, it is useful to distinguish between the two. A law prohibiting all people earning less than $3,000 per year from using a public park is a discrimination based on wealth; one forbidding entry to a park unless a $3 admission fee is paid is a discrimination based on ability to pay.

In *Harper* the Court struck down a $1.50 poll tax. The Court stated:

> A State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter *or* payment of any fee an

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[27] However, the citations to *Harper* and *Douglas* in the *McDonald* case may refer only to dicta; rather than holding, to the effect that wealth discriminations are invidious, without distinguishing between wealth discrimination and discrimination based on ability to pay. See the quotations from *Harper* and *Douglas*, *infra*, pp. 24-25, 29-30.

[28] See *Williams* v. *Illinois*, 399 U.S. 235, 242 (1970).

> electoral standard. Voter qualifications have no relation to wealth [383 U.S. at 666; emphasis supplied].
>
> * * *
>
> Lines drawn on the basis of wealth or property, like those of race, are traditionally disfavored. To introduce wealth *or* payment of a fee as a measure of a voter's qualification is to introduce a capricious or irrelevant factor. The degree of the discrimination is irrelevant in this context—that is, as a condition of obtaining a ballot—the requirement of fee paying causes an "invidious" discrimination that runs afoul of the Equal Protection Clause [383 U.S. at 668; citations omitted; emphasis supplied].
>
> * * *
>
> [W]*ealth or fee paying* has, in our view, no relation to voting qualifications [383 U.S. at 670; emphasis supplied].

Rich and poor alike were charged the $1.50 poll tax. The statute did not say to the poor man who manages by dint of great sacrifice to come up with the $1.50 poll tax, "You are not permitted to pay the $1.50 poll tax." The indigent citizen in *Harper* was denied the franchise only if he did not have the $1.50.[29] The state would clearly have accepted the fee from an indigent person who was willing to pay the fee. Strictly speaking, therefore, the statute discriminated on the basis of ability to pay, rather than wealth, although the effect may be and often is the same; namely, to wence out indigent voters.

[29] Of course the poll tax served as a depressant even to those who had the $1.50 but for whom payment was a greater sacrifice than for the wealthy. It is interesting to note, in this connection that the plaintiffs in *Harper* made no argument that they could not afford to pay the poll tax; they had standing even though they were not indigent.

This is obviously not to say, or even suggest, that *Harper* was wrongly decided. There are situations, of which *Harper* is one, where it is unconstitutional for government to discriminate even on the basis of ability to pay. Conversely, it is equally obvious that while all fee-paying requirements do discriminate on the basis of ability to pay, all such requirements are *not* unconstitutional. For example, it would be difficult to argue that the annual $25 fee, which the District of Columbia charges to practice law, violates the equal protection clause. To determine when a discrimination based on ability to pay violates the equal protection clause, we must examine the nature of the benefit which is being differentially distributed on the basis of ability to pay. In *Harper*, the benefit which was differentially distributed based on ability to pay was the franchise; the Court properly placed such great value on the franchise that it found that stringent review was required, and the state was not able to meet its burden of justification under this standard of review. We heartily agree with this conclusion.

However, the significance of *Harper* for the case at bar is that, by comparison, plaintiffs here have an even stronger case than the *Harper* plaintiffs. It does not matter whether a poor Florida county is willing to sacrifice in order to provide as good an education for its children as a wealthy county is able to provide; the poor county is nevertheless prevented from doing so, not because it cannot pay—we hypothesize that it is willing to sacrifice to make the payment[20] —but only because of its status as a poor county.

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[20] This hypothesis is supported by the fact that prior to the passage of the Millage Rollback Act, 24 Florida counties had imposed on themselves a higher tax rate than is permitted by the Millage Rollback Act. *See, supra*, p. 13.

Moreover, because *Harper* involved a classification based on ability to pay, rather than wealth, it required an examination of the nature of the benefit which was being differentially distributed on the basis of ability to pay. In our case the basis of discrimination is simply wealth rather than ability to pay. Accordingly, it is unnecessary here, just as it is unnecessary in a race case, to examine the nature of the benefit which the state is differentially distributing. The "compelling interest" test is applicable to a racial classification even when testing rules as to who may drink at a public fountain. Once a racial classification is drawn, it is unnecessary to ask for what purpose.[31] Similarly, in wealth discrimination cases, it does not matter for what purpose the distinction is drawn,[32] whether entrance to a park, entrance to a profession, availability of educational resources or the franchise.

Thus, while *Harper* involved a discrimination based on ability to pay, and hence required the Court to

[31] However, the application of the "compelling interest" test does not lead to a *per se* rule condemning all racial classifications. In some cases the state may be able to meet the burden of establishing a compelling state interest. It may be able to do this, for example, in the case of so-called benign racial classifications. See "Developments in the Law—Equal Protection," 82 Harv. L. Rev. 1065, 1104-1120 (1969).

[32] Again, the application of the "compelling interest" test does not lead to a *per se* rule condemning all wealth discriminations. As there are benign racial classifications, so there are benign wealth classifications, such as welfare payments (which discriminate in favor of the poor) and graduated income tax (which discriminates against the rich). Such discriminations would meet the "compelling interest" test.

consider the nature and importance of the benefit being differentially distributed (i.e., the franchise), in our case the fact that the discrimination is based on wealth rather than ability to pay in itself ineluctably leads to the conclusion that the "compelling interest" test is applicable.[33]

Our analysis of *Douglas* v. *California*, 372 U.S. 353 (1963) is much the same as our analysis of the *Harper* case. *Douglas* is one of a line of cases beginning with *Griffin* v. *Illinois*, 351 U.S. 12 (1956), in which this Court has ruled that in criminal proceedings the state may not discriminate between defendants on the basis of their ability to pay.[34] In *Griffin* the Court found that Illinois had made the transcript of the trial a prerequisite for appeal in criminal cases. The effect was to deny appeals to indigents who were not able to pay for a transcript. However, the state had not said that no indigent could appeal; it simply offered transcripts to all defendants on ostensibly equal terms, at a price approximating its costs. Thus, the state discriminated on the basis of ability to pay, rather than on the basis of wealth.

[33] We may also add that dicta in the *Harper* case, already quoted, indicate that wealth is an invidious classification. See also nn. 34-36, *infra*.

[34] *Griffin*, like *Harper*, contains dicta to the effect that wealth discriminations are invidious:

> In criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color.
>
> * * *
>
> It is true that a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all . . . But that is not to say that a State that does grant appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty [351 U.S. at 17-18].

As Mr. Justice Goldberg has observed, the *Griffin* case "la[id] to rest the notion that equal protection requires only equal laws and that the state is never obliged to equalize economic disparities."[35] The teaching of *Griffin* is that even a discrimination based on ability to pay is sometimes unconstitutional—in the *Griffin* case because of the importance to the defendant of the criminal sanction involuntarily imposed upon him by the state.

The *Douglas* case involved a claim of denial of the equal protection by an indigent criminal defendant who could not afford counsel on appeal. Following *Griffin*, the Court held that to allow a criminal defendant to appeal from a conviction with the assistance of counsel only on the condition that he be able to pay for his counsel amounted to an unconstitutional discrimination based on ability to pay.[36] This Court refused to put its stamp of approval on a rule pursuant to which "the type of appeal a person is afforded . . .

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[35] Goldberg, "Equality and Governmental Action," 39 N.Y.U. L. Rev. 205, 218 (1964).

[36] As in the other cases we have been discussing, the Court in *Douglas* used some language which did not distinguish between a discrimination based on wealth and a discrimination based on ability to pay:

> There is lacking that equality demanded by the Fourteenth Amendment where the rich man . . . enjoys the benefit of counsel's [assistance] . . . while the indigent . . . is forced to shift for himself . . . . [T]he evil is . . . discrimination against the indigent . . . . [A]n unconstitutional line has been drawn between rich and poor [372 U.S. at 355, 357, 358].

However, in terms of the analysis presented in this brief, we believe *Douglas* is an ability-to-pay case. In any event, it is clear from *Douglas* that lines drawn on the basis of wealth constitute invidious discrimination.

hinges upon whether or not he can pay for the assistance of counsel" (372 U.S. at 355-356).

A long line of cases followed in the train of *Griffin* and *Douglas*. See *Williams* v. *Illinois*, 399 U.S. 235, 241-42 (1970) (imprisonment to pay unpaid fines); *Williams* v. *Oklahoma City*, 395 U.S. 458, 460 (1969) (denial of trial transcript for lack of fee); *Anders* v. *California*, 386 U.S. 738, 741 (1967) (lack of funds to retain appellate counsel); *Swenson* v. *Bosler*, 386 U.S. 258, 259 (1967) (same); *Long* v. *District Court*, 388 U.S. 192, 194 (1966) (transcript); *Draper* v. *Washington*, 372 U.S. 487, 497-98 (1963) (transcript); *Lane* v. *Brown*, 372 U.S. 477, 483-84 (1963) (transcript); *Smith* v. *Bennett*, 365 U.S. 708, 710, 711, 714 (1961) (*habeas corpus* writ denied for lack of fee); *Burns* v. *Ohio*, 360 U.S. 252, 258 (1959) (lack of funds to pay appellate filing fee); *Eskridge* v. *Washington State Bd.*, 357 U.S. 214, 216 (1958) (transcript). See also *Entsminger* v. *Iowa*, 386 U.S. 748, 751-52 (1967); *Roberts* v. *La Vallee*, 389 U.S. 40, 42 (1967). However, none of these cases are as strong for the plaintiffs as the case at bar, involving as it does, discrimination based on wealth—in the narrowest meaning of that phrase.

D. The Line Drawn by the Millage Rollback Act Is Especially Invidious Because It Classifies on the Basis of Wealth in Respect to the Allocation of Educational Resources

As we have indicated above, we do not believe that in the case of a discrimination based on wealth it is necessary to ask for what purpose the discrimination has been made in order to determine whether the "compelling interest" test is applicable. However, if we consider the purpose for which the wealth discrimi-

nation has been made in this case, such consideration only reinforces the conclusion that the strictest judicial scrutiny is required here.

We have suggested that the purposes for which the ability-to-pay discriminations were made in the *Harper* and *Griffin-Douglas* line of decisions were crucial to the outcome. In *Harper* the Court forbade discrimination based on ability to pay because of the *importance* of the benefit involved (i.e., the franchise).[37] As this Court long ago noted, "The political franchise of voting" is "preservative of all rights."[38] Through the franchise, citizens are assured not only that *government* will treat them fairly, but that society will operate fairly. In the *Griffin-Douglas* line of cases the state had intervened in the life of the defendant against his will by initiating a criminal prosecution. Accordingly, the Court held that in determining whether to send a man to jail involuntarily,

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[37] We stress that in our view the result in *Harper* must be accounted for by the *importance* of the benefit rather than by the fact that the benefit in that case happened to be a "right." There are many "rights" with respect to which the state may discriminate on the basis of ability to pay. For example, a citizen has the "right to travel," *Shapiro* v. *Thompson*, *supra*; however, a state is permitted to charge a reasonable fee for the use of its highways, thus discriminating on the basis of ability to pay, even though this has an effect on an indigent's "right to travel." Accordingly, we must conclude that the result in *Harper* must be accounted for on the basis of the *importance* of the "*right to vote*", rather than by the fact that it is a "right." (Analytically, one would reach the result in the case of a reasonable highway use fee by saying that a discrimination based on ability to pay for use of a highway is reviewed under the "reasonable basis" test, and that such a fee meets that test. It probably would not meet the "compelling interest" test.)

[38] *Yick Wo* v. *Hopkins*, 118 U.S. 356, 370 (1886); see also, *Reynolds* v. *Sims*, 377 U.S. 533, 561-562 (1964).

the state may not discriminate on the basis of his ability to pay for the process made available to him.

The benefit distributed in the case at bar, educational resources, partakes of many of the elements which led the Court in *Harper* and in the *Griffin-Douglas* line of cases to conclude that the state may not discriminate on the basis of ability to pay. For these reasons, we believe that in the area of education—certainly through high school—a state is forbidden, in the absence of a compelling state interest, to discriminate on the basis of ability to pay.[39] Obviously, the Court need not reach that question in this case. Our point here is a narrow one: Considering the nature of the benefit involved in this case (i.e., educational resources), it is especially clear that the "compelling interest" test must be applied. Like the benefit in *Harper* (the franchise), the benefit involved here (educational resources) is of the utmost importance. Moreover, like the state intervention in *Griffin-Douglas*, which was without defendants' consent, Florida, too, has intervened involuntarily in the life of its children without their consent by making education compulsory. Accordingly, the state may not in these circumstances discriminate on the basis of ability to pay, and *a fortiori* it may not do so on the basis of wealth.[40]

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[39] Compare *McInnis* v. *Ogilvie*, 394 U.S. 322 (1969), *affirming mem.*, *McInnis* v. *Shapiro*, 293 F. Supp. 327 (N.D. Ill. 1968) and *Burruss* v. *Wilkerson*, *affirming mem.*, 310 F. Supp. 572 (W.D. Va. 1969), discussed, *infra*, pp. 47-59.

[40] A separate consideration which also militates toward a more stringent review is the fact that we are dealing here with the rights of children, an especially helpless minority who do not have access to the political process and who are in special need of the

1. The Importance of Education

In 1749 Benjamin Franklin wrote:

> The good Education of Youth has been esteemed by Men in all Ages, as the Surest Foundation of the Happiness both of private Families and of Commonwealths . . . Capacities require Cultivation, it being truly with them, as with the best Ground, which unless well tilled and sowed with profitable Seed, produces only ranker Weeds.[41]

This thought was echoed by this Court almost 200 years later when it said, "The public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny." *Illinois* v. *Board of Education*, 333 U.S. 203, 231 (1948).

And as this Court said in *Brown* v. *Board of Education*, 347 U.S. 483 (1954):

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later pro-

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Court's protection. As Mr. Justice Blackmun recently stated in *Wyman* v. *James*, 39 U.S.L.W. 4085, 5088 (decided January 12, 1971): "there is no more worthy object of the public's concern [than dependent children]. The dependent child's needs are paramount . . ." cf. *Reynolds* v. *Sims*, 377 U.S. 533, 565 (1964). See Choper, "On the Warren Court and Judicial Review," 17 C. U. L. Rev. 20, 36-42 (1967).

[41] "Proposals Relating to the Education of Youth in Pensilvania" (1749), 2 *Works of Benjamin Franklin* (Smyth ed. 1905), p. 388.

fessional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.[42]

In *Brown*, the Court went on to say:

> The opportunity of an education . . . where the state has undertaken to provide it, is a right which must be made available to all on equal terms [347 U.S. at 493].[43]

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[42] The Court of Appeals for the Fifth Circuit has used similar language:

> It requires no argument to demonstrate that education is vital and, indeed, basic to civilized society. Without sufficient education the plaintiffs would not be able to earn an adequate livelihood, to enjoy life to the fullest, or to fulfill as completely as possible the duties and responsibilities of good citizens. [*Dixon* v. *Alabama State Board of Education*, 294 F.2d 150, 157 (5th Cir. 1961)].

[43] See also *Hall* v. *St. Helena Parish School Board*, 197 F. Supp. 649, 656 (E.D. La. 1961), *aff'd on opinion below*, 368 U.S. 516 (1962). In 1779 Thomas Jefferson introduced in the Virginia legislature, "A Bill for the More General Difusion of Knowledge," 2 *The Papers of Thomas Jefferson* (Boyd ed. 1950), pp. 526-27. He stated:

> Whereas it is generally true that *people will be happiest* whose laws are best, and are best administered, and that laws will be wisely formed and honestly administered in proportion as those who form and administer them are wise and honest; whence it becomes expedient for promoting the publick happiness that those persons, whom nature hath endowed with genius and virtue, should be rendered by liberal education worthy to receive, and able to guard, the sacred deposits of the rights and liberties of their fellow citizens, and that they should be called to that charge without regard to wealth, birth or other accidental condition or circumstance; but the indigence of the greater number disabling them from so educating at their own expense, those of their children whom nature hath fittly formed and disposed to become useful instruments for the publick, it is better that such should be sought for and educated at the common expence of all.

In short, education not only provides individuals with a basis for pursuing a happy and satisfying life, but also enables the state itself to function properly. So understood, few things could be deemed more fundamental or important.[44] For this reason, education may

[44] Some have suggested that the opportunity to obtain an education in twentieth century America must be considered a fundamental right, and if so, this fact alone may result in the application of the "compelling interest" test. In *McDonald* v. *Board of Election Commissioners of Chicago*, 394 U.S. 802, 807 (1969), the Court suggested that the "compelling interest" test is applicable whenever a "basic fundamental right" is involved. While this Court has not yet found education to be a fundamental right, it has, despite the absence of any specific language in the Constitution, found interstate travel to be a constitutionally protected right (*Shapiro* v. *Thompson*, 394 U.S. 618, 630 (1969)), and found procreation to be a "basic civil right" (*Skinner* v. *Oklahoma*, 316 U.S. 535, 541 (1942)). In both of these cases, the Court applied a more stringent standard of review in an equal protection context, based on its finding that it was dealing with a fundamental right. (But see footnote 37). Similarly, the Court has found that the franchise in a state election is a fundamental right and that, therefore, the "compelling interest" test is applicable to legislative distinctions denying this franchise. (See, for example, *Kramer* v. *Union Free School District*, 395 U.S. 621, 627 (1969)). Finally, again without specific language in the Constitution, the Court has found a constitutionally protected right of privacy (*Griswold* v. *Connecticut*, 381 U.S. 479, 484-85 (1965)).

From this it follows that the "compelling interest" test would be applicable here if education were found—like interstate travel, procreation, privacy and the franchise in a state election—to be a constitutionally protected right. Certainly many, if not all, of the considerations which lead the Court to conclude that these other benefits are constitutionally protected rights are applicable to education. Cf. "Developments in the Law—Equal Protection," 82 Harv. L. Rev. 1065, 1133 (1969):

> History and custom, however, have by now established the assumption that everyone will receive some education, to be provided by the state if by no one else, and that a person's color or financial status should not determine how much education he gets. Education has come to be recognized as a

properly be compared with the right to vote, to which this Court applied the strictest standard of equal treatment in *Harper*.[45]

2. The Compulsory Nature of Education

Moreover, education in this country is compulsory. In Florida,[46] as in most states in the nation, children are required by law to attend school. Parents who willfully fail to send their children to school are guilty of a criminal offense.[47] When a state brings the weight of its sovereignty to bear by *requiring* a child to be educated, and, in addition, provides the major facilities for that education, it has intervened in the life of that child to much the same extent as was true in the *Griffin-Douglas* line of cases.

No one doubts that Florida's intervention in the life of its children, reflected in its compulsory school attendance laws, is as wise from society's viewpoint as was the criminal prosecution in the *Griffin-Douglas* line. And we also recognize that the two situations can be distinguished on the ground that in the case of compulsory school attendance laws the principal purpose

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critical interest similar to those involved in voting and the criminal process, necessary to a meaningful participation in human society and in the benefits which it offers.

See also Coons, Clune and Sugarman, "Educational Opportunity: A Workable Constitutional Test for State Financial Structures," 57 Calif. L. Rev. 305, 382-89 (1969).

[45] The strictest standard of review has been regularly applied in cases involving elections and the right to vote. See *Williams* v. *Rhodes*, 393 U.S. 23 (1968); *Reynolds* v. *Sims*, 377 U.S. 533 (1964) and subsequent reapportionment cases. See also *Hall* v. *Beals*, 396 U.S. 45, 52 (1969) (Marshall, J., dissenting).

[46] F.S.A. §§ 232.01-232.45.

[47] F.S.A. §§ 232.09, 232.19.

is to benefit the student, while in the case of the criminal prosecution the principal purpose is, if not correction, punishment. However, we believe that the critical element is, or should be, the fact of the state's compulsory and involuntary intervention, whatever might be its purpose. This may perhaps be illustrated by another hypothetical case. Suppose Florida passed a compulsory innoculation statute to guard against an epidemic disease, but made available only two serums which could be used. One, available to the recipient at a cost of $10, was without side effects; the other, available to the recipient at a cost of $1, had a potential for causing substantial adverse side effects. Surely such a law would be unconstitutional. Once the state requires innoculation, thus mandatorily intervening in the life of its citizens, it cannot discriminate between the recipients on the basis of their ability to pay. And the fact that the innoculation requirement is designed to benefit, not punish, the recipient is certainly no ground for distinguishing the cases.

* * *

Finally, this Court has already expressed itself that education may not be conditioned on wealth, at least in the absence of a compelling state interest. In the course of its opinion in *Shapiro* v. *Thompson*, 394 U.S. 618 (1969), the Court stated:

> We recognize that a State has a valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures, whether for public assistance, public education, or any other program. But a State may not accomplish such a purpose by invidious distinctions between classes of its citizens. *It could not, for example, reduce expenditures for education by barring indigent children from its schools.* [394 U.S. at 633; emphasis supplied].

The Court in *Shapiro* v. *Thompson* also met and rejected the notion that the state may dispense its largess in proportion to past contributions to the state fisc. Appellants' argument, said the Court:

> [W]ould permit the state to apportion all benefits and services according to the past tax contributions of its citizens. The Equal Protection Clause prohibits such an apportionment of state services.[48]

In summary, this Court explicitly stated in *McDonald* that a state may not discriminate on the basis of wealth (absent a compelling state interest for doing so). In *Harper*, and in the *Griffin-Douglas* line of cases, this Court held that the state may not discriminate even on the basis of ability to pay—again, absent a compelling state interest—when fundamentally important interests are involved and the state involuntarily intervenes in the life of a citizen, considerations which are also applicable here. If, in these circumstances, the state may not discriminate on the

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[48] In addition, three cases are presently before this Court which pose the question whether a particular discrimination based on ability to pay violates the equal protection clause. Two were argued last term and set for reargument this term. In the first of these, *Boddie* v. *Connecticut*, No. 27, Oct. T., 1970, indigent wives who want to divorce their husbands contend that Connecticut's $45 fee to file a divorce proceeding unconstitutionally discriminates against them because of their inability to pay the fee. In the second case, *Sanks* v. *Georgia*, No. 28, Oct. T., 1970, indigent tenants attack a provision of Georgia law which requires a double bond to be put up by a tenant as a prerequisite to defending an eviction proceeding. If the payment requirement in either of these cases is struck down on equal protection grounds, the holding would apply *a fortiori* to a case involving the distribution of educational resources on the basis of ability to pay. In the third case, *Tate* v. *Short*, No. 324, Oct. T., 1970, an indigent criminal defendant was jailed to work off a fine which he was unable to pay. Cf.

basis of ability to pay, surely it may not discriminate as Florida did here on the basis of wealth. Finally, in *Shapiro* v. *Thompson* the Court explicitly stated that wealth discrimination with respect to education would be unconstitutional.[49]

It remains only to discuss *Dandridge* v. *Williams*, 397 U.S. 471 (1970). Appellants argue (Br. 15-16) that the teaching of this case is that the "reasonable basis" test rather than the "compelling interest" test is applicable to the case at bar. We disagree.

Williams v. *Illinois*, 399 U.S. 235 (1970) and *In Re Antazo*, 89 Cal. Rptr. 255, 473 P.2d 999 (1970).

The most prominent lower court decision holding that Government may not discriminate in the distribution of educational resources on the basis of wealth is *Hobson* v. *Hansen*, 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom.*, *Smuck* v. *Hobson*, 408 F.2d 175 (D.C. Cir. 1969).

[49] Even Mr. Justice Harlan who has dissented from most of the equal protection cases on which we rely agrees that discrimination based on wealth is unconstitutional:

> It is said that a State cannot discriminate between the "rich" and the "poor" in its system of criminal appeals. That statement of course commands support . . . [*Griffin* v. *Illinois*, 351 U.S. 12, 34 (1956) (dissenting opinion)].
>
> The States, of course, are prohibited by the Equal Protection Clause from discriminating between "rich" and "poor" *as such* in the formulation and *application* of their laws. But it is a far different thing to suggest that this provision prevents the State from adopting a law of general applicability that may affect the poor more harshly than it does the rich. [*Douglas* v. *California*, 372 U.S. 353, 361 (1963) (dissenting opinion) (emphasis supplied as to the word "application")].

However, Justice Harlan does not appear to require the application of the "compelling interest" test to wealth classifications. See *Dandridge* v. *Williams*, 397 U.S. 471, 489 (1970) (concurring opinion); *Shapiro* v. *Thompson*, 394 U.S. 618, 659-61 (1969) (dissenting opinion).

In *Dandridge* the Court sustained Maryland's maximum family grant of welfare payments ($250 per month), regardless of size of the family. The constitutional claim was that this upper limit violated the equal protection clause because it discriminated against large families. The Court ruled that the "reasonable basis" test was applicable. Applying this test, the Court found that the maximum payment was reasonable because it encouraged employment and avoided discrimination between non-working welfare families and families of the working poor.

The Maryland scheme undoubtedly discriminated against large families in the distribution of welfare funds, in that large families received less per person than smaller families.

The fact that the Court did not apply the "compelling interest" test, notwithstanding the importance of the benefit, only indicates that the "compelling interest" test is not applicable on the basis of the importance of the benefit alone;[59] the Court must also examine the differentiating classification. In short, both the differentiating classification and the benefit (or detriment) distributed must be considered in determining whether the "reasonable basis" test or the "compelling interest" test applies. In *Dandridge* the Court ruled that the "reasonable basis" test was applicable to a discrimination based on family size in the distribution of welfare benefits; quite apart from the importance of welfare benefits, the differentiating classification involved—family size—was not an invidious one like wealth or race. Accordingly, while

[59] Cf., Mr. Justice Stewart's opinion in *Oregon* v. *Mitchell*, 39 U.S.L.W. 4037 (decided December 21, 1970).

the opinion in *Dandridge* could have discussed in greater detail why the "compelling interest" test was inapplicable, its application of the "reasonable basis" test was not plainly wrong.

Contrary to appellants' argument, however, *Dandridge* provides no predicate for concluding that a state may discriminate on the basis of *wealth* in the *distribution of educational resources*, or even on the basis of ability to pay, in the distribution of those resources. Accordingly, we conclude that the "compelling interest" test is applicable here and that *Dandridge* does not suggest the contrary.

E. No Reasonable Basis, Let Alone a Compelling State Interest, Can Be Found To Justify the Distinctions Drawn by the Millage Rollback Act

Having concluded that the "compelling interest" test is applicable to this case, we turn now to the question of possible justifications for the Rollback Act. We conclude that the Rollback Act is not only unsupported by a compelling state interest, but lacks even a reasonable basis.

In the court below, we chided the defendants for failing to advance any justification for this unequal treatment. "What interest," we asked, "has Florida in preventing its poorer counties from providing as good an education for their children as its richer counties?" The three-judge court asked the same question (App. 49-50), and searched in vain for an answer. Now for the first time—in their brief in this Court—appellants attempt to provide an answer.

Their answer, in short, is that the Millage Rollback Act is part of a larger legislative package designed to increase state—as opposed to local—support of

public education. By the "massive infusion of state money" made available by this legislative package (Br. 10), which is distributed on a wealth-free basis pursuant to the MFP formula, there is said to be effected a decrease in the variation in per pupil expenditures. In this way, say appellants, the unfairness of requiring districts of varying financial strength to provide substantial support for their own public school systems is ameliorated (Br. 3, 9-13, 18-19).[51] Laudable though this objective may be, appellants never explain why a wealth-related millage limitation on local support for schools is either a necessary or desirable part of this package. Nor do they explain how such a limitation would work in any way to increase state support (distributed on a wealth-free basis) for local public education systems. At best, appellants' argument reduces to the proposition that a wealth-related millage limitation is the necessary political price that must be paid if there is to be any

[51] Interestingly enough, appellants appear to contend that placing the responsibility for the support of local schools on local jurisdictions whose ability to bear that responsibility varies would be unconstitutional:

> To unleash the taxing power of the several school districts by striking down the Millage Rollback Law would compound and magnify the very inequities in public school financing of which appellees complain. The disparity of the tax impact per mill levied would vary so greatly between the property-poor county and the property-rich county as to truly justify a charge of "invidious discrimination", a concept roundly condemned by this Court [Br. 13].

Perhaps appellants mean to suggest that they should be permitted to reduce disparities attributable to local variations in ability to pay by placing a differential tax limitation on poor counties as opposed to rich counties. Such a limitation is a clearly unconstitutional way of alleviating disparities attributable to variations in ability to pay.

additional infusion into county school systems of state funds distributed on a wealth-free basis.[52] This, they suggest, constitutes a "reasonable basis" justifying the discrimination.

It is obvious, however, that this justification will not pass constitutional muster. The Florida legislature may be free to exact almost any price it wishes as a condition of increasing state support for public education—except an unconstitutional price.[53] It could not, for example, enlist necessary political support for greater state funding of public education by requiring, as part of the legislative package, segregated schools. Nor could it increase state support for public education by giving a greater share of the additional funds to wealthy counties than to poor counties. Similarly, it could not enlist the necessary political support for the infusion of new state money into the educational system by placing a more severe limitation on the financial support which poor counties may give to their public schools than on the financial support which rich counties may give to their public schools—which is precisely what Florida has done here.

Appellants further assert that Florida has the right to limit its expenditures for public schools. They

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[52] Although there is no recorded legislative history of the Millage Rollback Act, our understanding is that its enactment simply reflected the political power of certain property owners, who saw the statute as a means of reducing their local taxes and who secured its passage as a political tradeoff for their support of other legislation.

[53] Cf., Mr. Justice Marshall dissenting in *Wyman* v. *James*, 39 U.S.L.W. 4085, 4095-96 (decided January 12, 1971): "A paternalistic notion that a complaining citizen's constitutional rights can be violated so long as the state is somehow helping him is alien to our Nation's philosophy."

quote (Br. 14) from this Court's opinion in *Shapiro* v. *Thompson*, 394 U.S. 618, 633 (1969):

> A state has a valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures whether for public assistance, public education or any other program . . .

But appellants' abrupt termination of this quotation unfairly neglects the two sentences immediately following:

> But a State may not accomplish such a purpose by invidious distinctions between classes of its citizens. It could not, for example, reduce expenditures for education by barring indigent children from its schools.

Neither may it give unequal educational taxing authority to its rich and poor counties. As the *Shapiro* Court said in an only slightly different context, "The saving of welfare costs cannot be an independent ground for an invidious classification" (394 U.S. at 633).

Moreover, if Florida desires to limit the support local communities may give to their public schools, it may easily do so on a non-discriminatory basis. It could, for example, limit the amount of local support for education to X dollars per Instruction Unit, thereby incorporating all of the legitimate factors to which consideration is given in Florida's complicated formula for determining Instruction Units. Or it could impose a limitation in terms of dollars per pupil. This Court has on a number of occasions struck down classifications on equal protection grounds because of the availability of less drastic means for accomplishing the same purpose. For example, in *Shapiro* v. *Thompson*,

394 U.S. 618 (1969), the Court rejected as *unreasonable* a proffered justification of a statute because of the availability of alternative methods for accomplishing the same purpose:

> [T]here is no need for a State to use the one-year waiting period as a safeguard against fraudulent receipt of benefits; for less drastic means are available, and are employed, to minimize that hazard. Of course, a State has a valid interest in preventing fraud by any applicant. . . . [However] it is *unreasonable* to accomplish this objective by the blunderbuss method of denying assistance to all indigent newcomers for an entire year [394 U.S. at 637; emphasis supplied].

In short, when "means more finely tailored to achieve the desired goal," are available (*Turner* v. *Fouche*, 396 U.S. 346, 364 (1970)), the State's failure to use these means may, as it does here, result in an unreasonable classification,[51] and, *a fortiori*, a classification that is unsupported by a compelling state interest.

Appellants also suggest that the Millage Rollback Act "is not discriminatory on its face" (Br. 10) and

[51] See *Williams* v. *Illinois*, 399 U.S. 235, 244 (1970) ("[There are] numerous alternatives to which the State by legislative enactment—or judges within the scope of their authority—may resort in order to avoid imprisoning an indigent beyond the statutory maximum for involuntary nonpayment of a fine or court costs."); *Shelton* v. *Tucker*, 364 U.S. 479, 488 (1960) ("The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose.") See also, *Carrington* v. *Rash*, 380 U.S. 89, 94-96 (1965); *Aptheker* v. *Secretary of State*, 378 U.S. 500, 512-14 (1964); *Sherbert* v. *Verner*, 374 U.S. 398, 407 (1962); *Talley* v. *California*, 362 U.S. 60, 64 (1960); *Mullane* v. *Central Hanover Bank and Trust Co.*, 339 U.S. 306, 319 (1950); *Baldwin* v. *Seelig*, 294 U.S. 511, 521-22 (1934). See generally Struve, "The Less-Restrictive-Alternative Principle and Economic Due Process," 80 Harv. L. Rev. 1463 (1967).

"applies a ten mill taxing limitation to all Florida counties" (Br. 10). This is true. However, this Court has never regarded itself as confined by such a simplistic view of the requirements of equal protection. It is its effect that condemns the Millage Rollback Act; and that effect is necessarily to discriminate on the basis of wealth.

As the court below noted, "Even though the Act in question applies uniformly to each county it may nevertheless violate the Equal Protection Clause if its effect is discriminatory" (313 F. Supp. at 948; App. 49). Not the ostensibly evenhanded words, but the practical and necessary effect of the statute, given the demonstrable variation among counties in the tax base per pupil, is determinative. The courts must "determine whether there is an arbitrary or invidious discrimination between those classes." *McLaughlin* v. *Florida*, 379 U.S. 184, 191 (1964) and cases there cited. For cases applying this principle and holding statutes void on equal protection grounds based on their effect, see *Williams* v. *Rhodes*, 393 U.S. 23 (1968); *Carrington* v. *Rash*, 380 U.S. 89 (1965); *Reynolds* v. *Sims*, 377 U.S. 533 (1964) and subsequent reapportionment cases; *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960); *Griffin* v. *School Board of Prince Edward County*, 377 U.S. 218 (1964); *Hall* v. *St. Helena Parish School Board*, 197 F. Supp. 649 (E.D. La. 1961), *aff'd*, 368 U.S. 515 (1962); *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886). As Mr. Justice Black stated in *Griffin* v. *Illinois*, 351 U.S. 12, 17, n. 11 (1956), "[A] law nondiscriminatory on its face may be grossly discriminatory in its operation." See also cases there cited and *Williams* v. *Illinois*, 399 U.S. 235, 242 (1970).

Whether appellants will seek to find other justifications for the Millage Rollback Act, we cannot say. In any event, it is appropriate to observe that where avoidance of a danger is advanced to justify a statute, that danger must be a real one with real content, not one which, to use the words of this Court in *Williams* v. *Rhodes*, 393 U.S. 23, 33 (1968), "seems to us no more than 'theoretically imaginable' ".

F. The Significance of McInnis v. Ogilvie, 394 U.S. 322 (1969), and Burruss v. Wilkerson, 397 U.S. 44 (1970), to the Case at Bar

We turn now to a consideration of two *per curiam* decisions, which are relevant here not only because appellants place primary reliance upon them, but also because the Court's opinion and decision in this case may have significant import in interpreting these two decisions to the bench and bar. These cases are *McInnis* v. *Ogilvie*, 294 U.S. 322 (1969), *aff'g mem.*, *McInnis* v. *Shapiro*, 293 F. Supp. 327 (N.D. Ill. 1968) (Mr. Justice Douglas would have noted probable jurisdiction), and *Burruss* v. *Wilkerson*, 397 U.S. 44 (1970), *aff'g mem.*, 310 F. Supp. 572 (W.D. Va. 1969) (Mr. Justice Douglas and Mr. Justice White would have noted probable jurisdiction).[55]

[55] These cases and the problems they present have already produced a very considerable literature. See Coons, Clune & Sugarman, *Private Wealth and Public Education* (Harvard University Press, 1970); Silard and White, "Intrastate Inequalities in Public Education: The Case for Judicial Relief Under the Equal Protection Clause," 1970 Wisc. L. Rev. (1970); Shanks, "Equal Education and the Law," 39 *The American Scholar* 255 (1970); Shanks, Book Review, 84 Harv. L. Rev. 256 (1970); Michelman, "Foreword: On Protecting the Poor Through the Fourteenth Amendment," 83 Harv. L. Rev. 7 (1969); Coons, Clune and Sugarman, "Equal Educational Opportunity: A Workable Constitutional

In the *McInnis* case a group of Illinois students attacked that state's legal structure for financing public education because it "permit[ted] wide variations in the expenditures per student from district to district" (293 F. Supp. at 329) by placing major responsibility for financing public schools on local jurisdictions of widely varying financial strength. These students urged a three-judge district court to devise a financing system that would be based on each pupil's "educational needs" (*ibid.*). Recognizing that "the inequities of the existing arrangement are readily apparent" (293 F. Supp. at 331), the district court nevertheless dismissed the complaint without trial on two independent grounds. First, it ruled that "the Fourteenth Amendment does not require that public school expenditures be made only on the basis of pupils' educational needs" (293 F. Supp. at 329). Second, the court would not reallocate state funds on the basis of the students' "educational needs", because the Court found the concept both "nebulous" and "judicially unmanageable" (293 F. Supp. at 329, 335).

Test for State Financial Structures," 57 Calif. L. Rev. 305 (1969); "Developments in the Law—Equal Protection," 82 Harv. L. Rev. 1065 (1969); A. Wise, *Rich Schools, Poor Schools: The Promise of Equal Educational Opportunity* (University of Chicago Press, 1969); Horowitz & Neitring, "Equal Protection Aspects of Inequalities in Public Education and Public Assistance Programs from Place to Place Within a State," 15 U.C.L.A. L. Rev. 787 (1968); Kirp, "The Constitutional Dimensions of Equal Educational Opportunity," 38 Harv. Educ. Rev. 635 (1968), reprinted in *Equal Educational Opportunity* (Harvard University Press, 1969); Kurland, "Equal Educational Opportunity: The Limits of Constitutional Jurisprudence Undefined," 35 U. Chi. L. Rev. 583 (1968), reprinted in *The Quality of Inequality: Suburban and Urban Public Schools* (C. Daly, ed.; Univ. of Chicago Press, 1968); Horowitz, "Unseparate but Unequal—The Emerging Fourteenth Amendment Issue in Public School Education," 13 U.C.L.A. L. Rev. 1147 (1966).

On appeal to this Court, the judgment was affirmed by memorandum order for want of a substantial federal question, 394 U.S. 322 (1969). Mr. Justice Douglas would have noted probable jurisdiction.

Burruss presented essentially the same factual situation as *McInnis*. Procedurally, however, defendants presented a motion to dismiss to a single district judge who was thus required to rule on the substantiality of plaintiffs' constitutional contention. Chief Judge Dalton, writing before this Court's *per curiam* affirmance in *McInnis*, ruled that the question was substantial and that a three-judge court must be convened:

> Poverty does appear to be a factor contributing to the conditions which give rise to the plaintiffs' complaint. It is clear beyond question that discrimination based on poverty is no more permissible than racial discrimination . . . . [301 F. Supp. at 1239]

Apparently because the motion to dismiss was not renewed to the three-judge court after this Court's decision in *McInnis*, a trial was had in *Burruss*. Plaintiffs established that they were from a poor rural Virginia county and that their extreme poverty prevented them from providing an even marginally adequate school system despite the fact that their school tax rates were unusually high and far in excess of many counties with well-financed school systems.

When the three-judge court wrote, this Court's decision in *McInnis* had already been handed down. Nevertheless the district court took the occasion in its opinion dismissing the complaint to observe:

> The existence of such deficiencies and differences is forcefully put by plaintiffs' counsel. They are not and cannot be gainsaid [310 F. Supp. at 574].

However, the Court found that

> The circumstances of [the *McInnis* case] are scarcely distinguishable from the facts here [*Ibid.*].

Thus, the Court dismissed the case, but added

> While we must and do deny the plaintiffs' suit, we must notice their beseeming, earnest and justified appeal for help [*Ibid.*].

On appeal to this Court, the judgment was affirmed *per curiam* on the jurisdictional papers. 397 U.S. 44 (1970). Mr. Justice Douglas and Mr. Justice White would have noted probable jurisdiction.

We shall show below that even giving the broadest reading to the *per curiam* decisions in *McInnis* and *Burruss*, both cases are easily distinguishable from the case at bar. However, because how the Court deals here with *McInnis* and *Burruss* will have an inevitable effect on how these cases are applied by lower courts in the future, we shall also discuss the institutional problem which faces the Court in deciding what precedential effect should be given to *per curiam* affirmances of novel and difficult questions. Finally, we shall briefly suggest why we believe *McInnis* and *Burruss* were wrongly decided, not because we think they should be overruled in this case—we do not—but because we believe the Court's consideration of these cases in its opinion in the instant case should not preclude that possibility in future cases.

1. Distinguishing McInnis and Burruss

Initially, and as the court below agreed, *McInnis* and *Burruss* may easily be distinguished from the case at bar, both factually and on the basis of the legal principles involved. Briefly stated, *McInnis*

and *Burruss* both involved discriminations on the basis of ability to pay, while the instant case involves a discrimination based on wealth. As the three-judge court stated in *Burruss*:

> Truth is, the inequalities suffered by the school children of Bath are due to the inability of the county to obtain, locally, the moneys needed to be added to the State contribution to raise the educational provision to the level of that of some of the other counties or cities. [310 F. Supp. at 574].

Whatever doubt there may be regarding the constitutionality of a discrimination in the allocation of educational resources based on ability to pay in particular circumstances, it is clear, as we have shown above, that the state may not distinguish among its children simply on the basis of wealth.

The difference in applicable legal principles is reflected by the different factual situations in *McInnis* and *Burruss* on the one hand, and in the instant case on the other. The plaintiffs in *McInnis*[56] challenged the laws structuring the financing of public schools because they "*permit* wide variations in the expenditures per student from district to district" (293 F. Supp. at 329) (emphasis supplied). "State statutes which *permit* such wide variations allegedly deny the less fortunate Illinois students of their Constitutional rights" (293 F. Supp. at 330) (emphasis supplied). Thus, the *McInnis* plaintiffs objected to the fact that some parents in wealthy districts were *able* to finance a better education for their children than parents in poorer districts. This is precisely the opposite of the position taken by appellees here. We do not here

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[56] The ensuing discussion applies *pari passu* to *Burruss*.

object to a state scheme that *permits* variations in per pupil expenditures. Our complaint is that the state *prevents* us from adequately undertaking the responsibility of financing our children's education—a responsibility which is identical to that of wealthier counties.

As the court below stated in the instant case:

> The opposite situation [from that in *McInnis* and *Burruss*] confronts us in this case where the school districts (counties) are seeking, through the plaintiffs, *to be able* "to determine their own tax burden according to the importance which they place upon public schools."
>
> The Florida Act *prevents* the local Boards from adequately financing their children's education. The complaint is not [as in *McInnis* and *Burruss*] that the state *permits* the Boards to spend less, but that it *requires* them to spend less. Plaintiffs are asking to be able to *raise* more money *locally*. In *McInnis* the plaintiffs wanted the state to *give* them more. Irrespective of the plaintiffs' successful attack on the Act, we know that there will continue to be disparities in per pupil expenditures in Florida, either because some counties may not desire to spend as much as other counties on the education of their children, or because, in the poorer counties, they cannot. Plaintiffs do not contest the variations in per pupil expenditures from these causes, but only "the unequal impediment placed on us by the state because we are poor." We consider this to be a fundamental distinction between the cases [313 F. Supp. at 949; App. 51-52].

The *McInnis* case may also be distinguished on the ground that the *McInnis* plaintiffs argued that the court was under a judicial duty to allocate the state's educational resources according to individual students'

educational needs.[57] However, because the concept of education needs was left undefined (as the court noted at 293 F.2d at 329, n. 4, 335, 336), the court was faced with a "definition of standard" problem. By contrast, we have here no problem of defining the standard by which to allocate educational resources; we argue only negatively, that the state is forbidden to discriminate on the basis of wealth.[58]

Finally, in this case, in contrast to the *McInnis* case, we seek no judicially unmanageable relief. No matter who prevails here, the Florida state authorities will carry on exactly as before. If appellants prevail, the state will continue to disburse MFP funds because no county will levy in excess of 10 mills. If appellees prevail, the state will continue to disburse the same amount of MFP funds because there will be no Roll-back Act sanction to prevent it from doing so.

2. McInnis and Burruss Should Be Limited to Their Precise Facts

Thus far, our discussion of *McInnis* and *Burruss* has assumed, contrary to fact, that the lower court opinions in those cases had been adopted *in haec verba* by this Court. As we have shown, even were this the case, appellees would nevertheless be entitled to an affirmance here. In fact, this was not the case. Each of these decisions was affirmed *per curiam* on

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[57] Compare our use of the term educational needs. See footnote 23, *supra*, p. 20.

[58] There are an enormous number of non-wealth-related financing systems, many of them allowing the local jurisdiction to set its own local tax-rate depending on the importance it places on education, that do not violate the negative command of the equal protection clause. See Coons, Clune and Sugarman, *Private Wealth and Public Education* (Harv. Univ. Press 1970), pp. 280-83; Shanks, Book Review, 84 Harv. L. Rev. 256 (1970).

jurisdictional papers. This, it seems to us, raises the problem as to the meaning of a *per curiam* affirmance on jurisdictional papers when the question is both novel and difficult—or, to put the matter somewhat differently, how such a *per curiam* decision should be read.

It cannot be gainsaid that, if we look only to the holdings in *McInnis* and *Burruss*, this Court has twice held that states are free to distribute educational resources to local districts on the basis of their ability to pay for them, at least in the particular circumstances of those cases.

However, the experience of recent years clearly suggests that the procedure on appeals is becoming increasingly similar if not identical to the procedure on certiorari. At least in the mind of the practitioner and perhaps also in the mind of the Court, an appellant, like a petitioner, must first seek the Court's consent to hear his case. Reasoning thusly, the notation of probable jurisdiction is the equivalent to the grant of certiorari, and the papers on which each decision is made are substantially identical.

In cases presenting novel and difficult issues, however, the Court cannot reasonably treat appeals as cases in which the issues must pass an initial discretionary screening and, at the same time, treat the summary affirmance or dismissal (which in reality is no more than a failure to note probable jurisdiction) as anything more than a denial of certiorari. Moreover, as a practical matter where a novel and difficult question is decided by summary affirmance on jurisdictional papers, that decision *should* have no more effect on future cases, either in this Court or in lower courts, than a denial of certiorari.

It may well be that the Court has hesitated to state that a summary affirmance of a novel and difficult

question has no precedential value because this would appear to conflict with the congressional directive to give appellate consideration to these cases. The most appropriate resolution of this problem might well be the passage of legislation increasing the area of the Court's discretionary as opposed to obligatory review. However, saying nothing and leaving a *per curiam* affirmance standing as an apparently dispositive precedent of the same factual situation leaves the bench and bar in confusion, discourages the bench and bar from assisting this Court in the resolution of novel and difficult problems after the rendering of a *per curiam* affirmance,[59] and requires the Court itself to act inconsistently and in conflict with its own "prece-

[59] In a number of cases the *McInnis* decision has been taken to foreclose further discussion. In addition to the *Burruss* case, see, e.g., *Serrano* v. *Priest*, Civ. No. 35017 (Calif. Ct. App., 2d Dist., decided September 1, 1970), now on petition for rehearing before Calif. Sup. Ct. No. 938254 ("We are bound by decisions of the Supreme Court on questions depending upon the construction of the United States Constitution . . ., and a summary affirmance by the Supreme Court is a decision on the merits which has precedential value.")

On the other hand, Judge Friendly, after an ambiguous reference to the *McInnis* case, recently stated that "This is a developing area of application of the equal protection clause, and questions should not be deemed unsubstantial merely because they might have been so considered twenty years ago". *McMillan* v. *Garlick*, 430 F.2d 1145, 1150 (2d Cir. 1970). After noting that this area of the law "has already attracted a considerable volume of scholarly writing" (Id., n. 7) citing much of the literature we have cited in footnote 55, Judge Friendly on behalf of a unanimous panel ordered the convening of a three-judge court to consider issues which trench very close to this Court's holding in *McInnis*. Compare the statement of the Fifth Circuit in the instant case ordering the convening of a three-judge court after this Court's decision in *McInnis*: "Noting that lines drawn on wealth are suspect and that we are here dealing with interests which may well be deemed fundamental, we cannot say that there is no reasonably arguable theory of equal protection which would support a decision in favor of the plaintiffs": *Hargrave* v. *McKinney*, 413 F.2d 320, 324-25 (5th Cir. 1969).

dent" when the ultimate resolution of an issue, following briefs and arguments, turns out to be different from what must be regarded as a technical resolution of the issue by the *per curiam* affirmance.[60]

Pending legislative resolution of this problem, it seems to us that it would be entirely appropriate for the Court to state that the precedential value of a *per curiam* affirmance on jurisdictional papers of cases involving novel and difficult issues is limited very narrowly to the particular facts of the decided case. Certainly, that should be so with respect to this Court's *per curiam* affirmances in *McInnis* and *Burruss*, cases which illustrate the problems discussed above. A Delphic one-sentence affirmance of a difficult and novel question must be given the narrowest possible reading, limited to its precise facts, because all that can be said as a result of such an affirmance is that, given the complex of factors presented in a particular case, the appellants were not entitled to prevail at the time. The Court has not disclosed why it ruled as it did and there is no way a subsequent court—this Court or any other—can know whether precisely those factors which caused the Court to rule as it did are present in a subsequent case. Therefore, a *per curiam* decision in these circumstances should not be read as extending beyond the narrow facts of the particular case.

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[60] This Court has on occasion reversed itself even after a series of *per curiam* affirmances. E.g., *Baker* v. *Carr*, 369 U.S. 186, 278 (1962); *McGowan* v. *Maryland*, 366 U.S. 420, 511 (1961). See also *Minersville School District* v. *Gobitis*, 310 U.S. 586 (1940), where the Court gave plenary consideration to an issue which had previously been ruled on in a series of *per curiam* decisions. *Gobitis* was, of course, overruled in *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624 (1943).

3. Even the Narrow Holding in McInnis and Burruss Is Incorrect

We would be less than candid if we did not note our conviction that *McInnis* and *Burruss* were decided incorrectly and that ultimately this Court will decide *not* to adhere to those decisions. We hasten to add that it is also our view that it would be inappropriate for the Court to overrule those decisions in this case. Nevertheless, it may be appropriate to discuss, if only briefly, the merits of *McInnis* and *Burruss*.

In our view the *next McInnis* or *Burruss* case should be considered as presenting the narrow question as to whether elementary or secondary public school education may be differentially distributed within a state on the basis of ability to pay. This Court has already ruled—we believe correctly—that a state may not discriminate on the basis of ability to pay either in the distribution of the franchise or in access to prerequisites for criminal appeal.[61] The question is, therefore, whether these holdings should be extended to elementary and secondary school education. In addition to factors we have previously discussed,[62] special weight should be given to the unusually heavy state involvement in this education delivery system. In many localities, the state is the exclusive agency which offers this necessary service.[63]

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[61] *Harper* and *Griffin-Douglas* line of cases, see *supra*, pp. 24-30.

[62] The importance of elementary and secondary education, and the fact that elementary and secondary schooling are compulsory.

[63] This factor, together with the factors listed in the previous footnote, easily distinguishes the case of elementary and secondary education from, for example, a municipal opera, for which the same fee is charged of rich and poor alike.

This is not to say that these considerations are exhaustive or that the law in this area[64]—as to when a state is forbidden to discriminate on the basis of ability to pay—is at the end of its development. It is not necessary at this point to define its ultimate reach. The Court, in our view, should proceed on a case by case basis. However, the time has clearly come, we believe, to take the next step.[65]

Indeed, we believe that the step has already been taken, at least in dicta. In *Shapiro* v. *Thompson,* 394 U.S. 618, 633 (1969), the Court stated that a state may not provide benefits to its citizens on the basis of their past tax contributions. Is that not precisely what the states have done when they make the amount of funds available for public education depend on the amount of a local tax?

Consider the case in which the state imposes a statewide real estate tax to support its public education system. Suppose further that the state appropriated to each local district for the operation of its public school system the amount of money which was produced by the state real estate tax from the district. Surely, this would be unconstitutional and in plain violation of this Court's *dicta* in *Shapiro* v. *Thompson, supra.* We submit that this is in fact the same situation that presently exists whenever the state says to its local school districts that they are expected

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[64] Cf. Mr. Justice Marshall dissenting in *Dandridge* v. *Williams,* 397 U.S. 471, 519-30 (1970).

[65] Cf. Mr. Justice Goldberg: "It is said that the Government cannot be expected to equalize all economic disparities. Of course it cannot, but this does not mean that it should not try to eliminate disparities in certain critical areas . . ." Goldberg, "Equality and Governmental Action," 39 N.Y.U. L. Rev. 205, 224 (1964).

to fund their public education system from local real estate taxes, despite their varying abilities to do so.

While we do not seek or expect this Court to overrule *McInnis* and *Burruss* in this case, we would request that the Court do nothing which would hinder the continued exploration of these issues, toward the end that when these issues are directly presented to the Court, it may avail itself of this continued study and, hopefully, rule otherwise than it did in *McInnis* and *Burruss*.

II. THIS COURT SHOULD NOT ABSTAIN FROM DECIDING THIS CASE IN DEFERENCE TO A STATE COURT

There are two possible bases on which abstention might be urged in this case, neither of which is, as we shall show, sound. The first is that the statute under attack here, the Millage Rollback Act, is of uncertain meaning; a state court interpretation of the Rollback Act may either modify the federal constitutional question, or, by construction, avoid it altogether. The second abstention argument which could be put forward here is that appellees might obtain the same relief they seek here on the basis of some provision of Florida law not previously involved in this litigation. The thrust of this argument is that by sending appellees to a state court to seek such relief, the federal constitutional question might be avoided. Neither argument is valid.

1. We agree that where the meaning of the state statute *under attack* is uncertain and a state court interpretation of it might avoid or modify the federal constitutional question, abstention is proper. *Wisconsin* v. *Constantineau*, 39 U.S.L.W. 4128 (decided January 19, 1971); *Fornaris* v. *Ridge Tool Co.*, 400 U.S.

41 (1970); *Reetz* v. *Bozanich*, 397 U.S. 82 (1970); *Zwickler* v. *Koota*, 389 U.S. 241, 249 (1967); *Harman* v. *Forssenius*, 380 U.S. 528, 534-35 (1965).

However, this principle is inapplicable here because there is no conceivable uncertainty in the Millage Rollback Act. It speaks with utter clarity, and appellants have not even attempted to identify any uncertainty or ambiguity in the *statute under attack*, or any interpretation of it which might avoid or modify the federal constitutional question.[66]

2. Appellants' principal abstention argument is that appellees may be able to obtain in a state court the same relief they seek here, but on the basis of some provision of state law, rather than on the basis of the Fourteenth Amendment.

Appellants' contention has been specifically rejected by this Court as to cases, like the instant one,[67] brought under 42 U.S.C. § 1983. *Monroe* v. *Pape*, 365 U.S. 167 (1961); *McNeese* v. *Board of Education*, 397 U.S. 668 (1963). These cases establish the proposition, at least as to Section 1983 cases, that the availability of relief under state law in a state court does not of itself preclude a litigant from first seeking relief in a federal court on federal grounds.

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[66] This is in contrast, for example, to the *Harman* case, *supra*, where the Court considered several suggestions put forth by the state as to how the state statute under attack could be interpreted so as to avoid or modify the federal constitutional question. The Court found that each of these suggestions was so clearly incorrect that it failed to provide the uncertainty which is a precondition to abstention, even though the state statute had never before been interpreted. See also *Zwickler* v. *Koota*, *supra*, at 249.

[67] Appellees' complaint asserts a cause of action under Section 1983 (App. 3).

In *Monroe* v. *Pape*, the Court stated (at 183):

> It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked.

This thought was elaborated in *McNeese* (at 671-72):

> [R]elief under [Section 1983] may not be defeated because relief was not first sought under state law which provided a remedy.
>
> The purposes [of Section 1983] were several-fold —to override certain kinds of state laws, to provide a remedy where state law was inadequate, "to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice" *and to provide a remedy in the federal courts supplementary to any remedy any State might have* . . . .
>
> *We would defeat those purposes if we held that assertion of a federal claim in a federal court must await an attempt to vindicate the same claim in a state court* [citations omitted; emphasis added].

Appellants' reliance on *Reetz* v. *Bozanich*, *supra*, is misplaced. First, the *Reetz* plaintiffs, unlike appellees in the instant case, did not and could not rely on Section 1983 as a substantive basis for federal jurisdiction (see Appendix in No. 185, Oct. T. 1969, pp. 1-2: *Hague* v. *CIO*, 307 U.S. 496, 527-31 (1939) (Stone, J., concurring); *Eisen* v. *Eastman*, 421 F. 2d 560, 563-66 (2d Cir. 1969)). Appellees here, relying on Section 1983, assert a personal interest affecting a broad class of citizens, compared to the solely economic interest asserted in *Reetz*.

But even if appellees could *not* have brought their action under Section 1983, abstention would be inappropriate here. While *Reetz* did send the litigants to a state court to determine whether they could get the relief they sought on state-law grounds, the subsequent case of *Wisconsin* v. *Constantineau, supra,* held that the possible availability of relief on state-law grounds was not adequate ground for abstention, presumably whether or not the federal cause of action was grounded on Section 1983. "For all we know," argued the dissenters in *Constantineau,* "the state courts would find this statute invalid under the State Constitution." However, the majority rejected this argument. Mr. Justice Douglas, speaking for six members of the Court, stated:

> There is no ambiguity in the statute [under attack] . . . Where there is no ambiguity in the state statute, the federal court should not abstain but proceed to decide the Federal constitutional claim [Slip Op. 6].

This would appear to suggest rather clearly that only an uncertainty or ambiguity in the *statute under attack* would provide the necessary predicate for abstention, the *Reetz* case notwithstanding. The *Constantineau* Court appears to have read the *Reetz* decision only as affirming the well-established principle, as stated in *Reetz*, that abstention "should be ordered only where 'the issue of state law [as to the meaning of the state statute under attack] is uncertain.'" (397 U.S. at 86).[68]

While the holding in *Reetz* can be reconciled with *Constantineau* on the ground that the latter was a

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[68] See Judge Dwyer's excellent discussion of the abstention doctrine (App. 47) and a similar discussion of that doctrine and of the *Reetz* case in *Hall* v. *Garson,* 430 F.2d 430, 436-37 (5th Cir. 1970).

Section 1983 case[69] and *Reetz* was not, the *Constantineau* opinion does not appear to rest on this distinction.[70] A sounder basis for reconciling the holdings in the cases, if that is to be done, is that in *Reetz* the plaintiffs vigorously pressed their non-federal claim side by side with their federal constitutional claim. The *Reetz* plaintiffs even persuaded the lower court of the validity of their non-federal claim. In *Constantineau*, as here, plaintiffs have pressed only their federal constitutional claim. Any state-law claim which appellees may have here is being urged only by appellants. Thus, the *Reetz* case merely held that when a litigant presses a federal constitutional claim *and* a non-federal claim, a federal court should first give a state court the opportunity to pass on the non-federal claim rather than itself passing on that claim. (Cf. *Ashwander* v. *T.V.A.*, 297 U.S. 288, 346-48 (Brandeis, J., concurring)). But the *Reetz* case cannot be interpreted, especially in light of *Constantineau*, as permitting a defendant to dredge up some non-federal ground which the plaintiff has not even pressed, and use this as more or less "reverse removal" to obtain a federal abstention order.

Thus far, we have assumed the existence of a state-law remedy which might give appellees the same relief they seek here. However, appellants have not even directed this Court's attention to the particular provisions of state law under which they suggest appellees might have a substantial possibility of obtaining relief. Although urging this Court to abstain on the basis of a case entitled *The School Board of Broward County,*

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[69] See Appendix in No. 95, Oct. T., 1970, p. 102.

[70] Moreover, it is difficult to understand why abstention should be ordered any more quickly where a claim is based directly on the Fourteenth Amendment, rather than on Section 1983.

Florida v. *Christian*, No. 69-932, Second Judicial Circuit in and for Leon County, Florida, appellants do not even advise the Court what state law contentions have been, or could be, made in that case.[11] Whether the grounds of attack were frivolous or substantial is not disclosed, nor are we told even the provision of the Florida constitution upon which the attack is based.

There is a final consideration which militates against abstention here. In *Harman* v. *Forssenius, supra*, this Court stressed two factors, both present in the instant case, which influenced its decision not to abstain:

1. The delicate and sensitive nature of the constitutional deprivation alleged; and

2. The importance of immediate court relief to a broad class of citizens if the allegations be proved.

The *Harman* Court stated:

> Support for the District Court's refusal to stay the proceedings is found in the nature of the constitutional deprivation alleged and the probable consequences of abstaining.
>
> As this Court has stressed on numerous occasions, "[t]he right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions of that right strike at the heart of representative government."

[11] On January 12, 1971, counsel for appellees spoke with counsel for Broward County, Lewis Hall, Esquire. Mr. Hall advised that the *Broward County* case had "withered on the vine" and "had been dismissed for lack of prosecution." A call to the Clerk of the Court for Leon County established, however, that no formal order of dismissal has yet been entered. Nevertheless, no action has been taken in the case since September 17, 1969, the date on which the answer was filed. (The complaint was filed on September 3, 1969.)

> In appraising the motion to stay proceedings, the District Court was thus faced with a claimed impairment of the fundamental civil rights of a broad class of citizens.
>
> Given the importance and immediacy of the problem, and the delay inherent in referring questions of state law to state tribunals, it is evident that the District Court did not abuse its discretion in refusing to abstain [380 U.S. at 537; citations omitted].

These considerations are fully applicable here. Few rights could be more important than the right of a child to an educational opportunity unhobbled by unconstitutional restraints. Moreover, the loss to the student appellees is irreparable. There is no way that this Court, or any court, can give them the quality education that they are losing each day as a result of the application of this unconstitutional statute. The "immediacy of the problem" which the Court found in *Harman* is present as well in the case at bar.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

GLASSIE, PEWETT, BEEBE & SHANKS

By

HERSHEL SHANKS
ALLAN I. MENDELSOHN
ROBERT M. PERCE, JR.
Federal Bar Building West
1819 H Street, N. W.
Washington, D. C. 20006

RICHARD H. FRANK
918 Marine Bank Building
Tampa, Florida 33602

Attorneys for Appellees

DAVID RUBIN
1201 Sixteenth Street, N.W.
Washington, D. C. 20006
Of Counsel

APPENDIX A

The Millage Rollback Act, as originally enacted in 1968, provides as follows:

236.251 Tax levy; participation in minimum foundation program; limitation.—

(1) Effective July 1, 1968, each school board desiring to participate in the minimum foundation program for kindergartens and grades one through twelve shall levy no more than ten mills of tax on the nonexempt assessed valuation of the district, exclusive of voted district building and bus, required debt service, and the millage required for junior college minimum effort. If the application of the above millage limitation creates a condition in any district wherein its 1968-69 current operating budget from state and district tax sources cannot exceed its 1967-68 current operating budget by at least twelve hundred dollars per instruction unit, the allocation of state funds shall be increased to the extent necessary to provide a twelve hundred dollar increase per instruction unit in its 1968-69 operating budget.

(2) For the purposes of this section, current operating budget shall mean the total budget from state sources as provided in §§ 236.07(10) and 236.075 and local taxes, exclusive of the amount collected for building and bus, required debt service, and junior college minimum required effort.

(3) The millage limitation of ten mills in this section may be increased to the extent necessary to replace any decrease in funds from Public Law 874 from the previous year.

APPENDIX B

Chapter 70-94, § 8 Florida laws, 1970 made certain changes in the Millage Rollback Act. Printed below is the text of the Millage Rollback Act, the words in brackets being deletions in the Act as originally enacted in 1968 and the words in italics being the additions made by the 1970 amendments:

Section 8. Section 236.251, Florida Statutes, is amended to read:

236.251 Tax levy; participation in minimum foundation program; limitation.—

[(1)] Effective July 1, [1968,] *1970,* each school board desiring to participate in the minimum foundation program for kindergartens and grades one (1) through twelve (12) shall levy no more than ten (10) mills of tax on the nonexempt assessed valuation of the district, exclusive of *millage voted for:* [voted district building and bus,] *local capital improvement,* required debt service, [and the millage] required [for] junior college minimum effort[.] *, required additional kindergarten local effort, commissions to tax collector and tax assessor, deficit in state funding of retirement matching, cost of liability insurance due to waiver of sovereign immunity, capital improvements under section 9 of article VII of the state constitution, and the amount of money necessary to replace any decrease in funds from Public Law 874, decrease meaning the difference between that amount of money received by the school district during the current fiscal year and the largest amount of money received by the said district under the said law subsequent to July 1, 1967.* [If the application of the above millage limitation creates a condition in any district wherein its 1968-69 current operating budget from state and district tax sources cannot exceed its 1967-68 current operating budget by at least twelve hundred dollars per instruction unit, the allocation of state funds shall be increased to the extent necessary to provide a twelve hundred dollar

increase per instruction unit in its 1968-69 operating budget.

(2) For the purposes of this section, current operating budget shall mean the total budget from state sources as provided in sections 236.07(10) and 236.075 and local taxes, exclusive of the amount collected for building and bus, required debt service, and junior college minimum required effort.

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SUPREME COURT, U.S.
Supreme Court, U.S.
FILED
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ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970
NO. 573

Governor Reubin O'D. Askew, et al.,

Appellants,

—v.—

Robert H. Hargrave, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

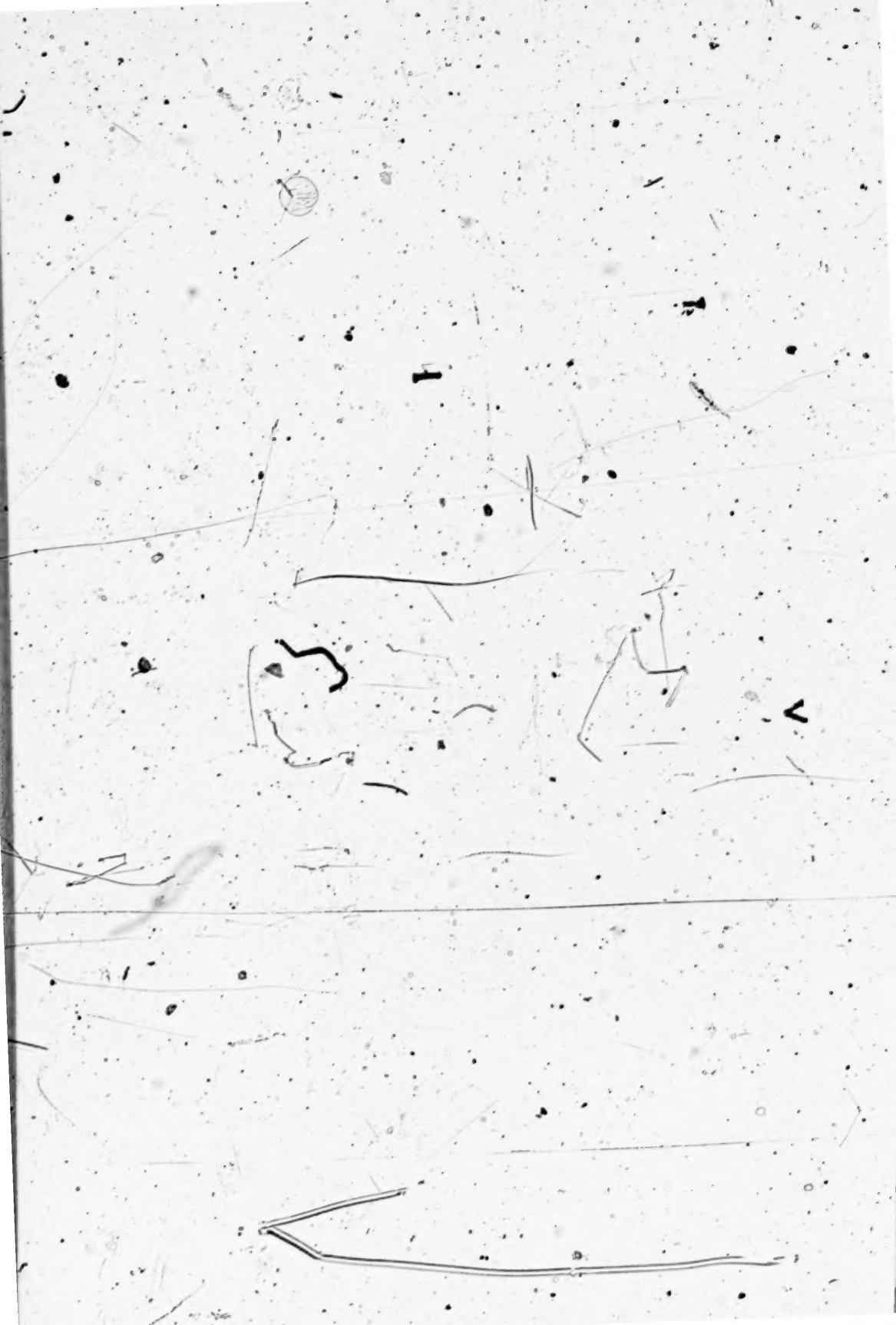
REPLY BRIEF OF APPELLANTS

RIVERS BUFORD, JR.
General Counsel
State Board of Education
347 Miles Johnson Building
Tallahassee, Florida 32304

STEPHEN MARC SLEPIN
Counsel
State Board of Education
347 Miles Johnson Building
Tallahassee, Florida 32304

CHARLES E. MINER, JR.
Counsel
State Board of Education
347 Miles Johnson Building
Tallahassee, Florida 32304

Attorneys for Appellants



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ARGUMENT

I.

APPELLEES CREATE A MISLEADING IMPRESSION OF THE EFFECT OF THE MILLAGE ROLLBACK ACT.

Throughout the instant proceedings appellees have asserted that the so-called Millage Rollback Law violates the equal protection clause of the Fourteenth Amendment because "it fails to provide Florida children with an economically equal educational opportunity."[1]

Appellees' arguments, while scholarly in content and artfully presented, contain not a whit or scintilla of support for the

[1] Plaintiffs' Brief in Support of Motion for Summary Judgment, page 5, document #282, original file.

proposition that Florida school children are, in fact, being economically shortchanged. They attempt to induce the Court to examine, entirely out of context, a single sentence in a complex legislative enactment. They go to exhaustive lengths to isolate local funding from the overall picture of school financing in Florida. The end product of their theoretical distinctions and strained analogies is a distorted picture of the effect of the Millage Rollback Law in the overall legislative context in which it was enacted.

In this reply brief we shall attempt to restore some semblance of perspective to educational financing in Florida.

Financing public education in Florida is a state responsibility, and in making "adequate provision" for a "uniform system of free public schools" the legislature has the responsibility for making the ultimate determination of what revenue sources should be used in carrying out this state responsibility.[2]

The Millage Rollback Act was the twenty-third section of a complex school finance bill passed at the Extraordinary Session of the Florida Legislature convened in February, 1968 to deal with educational problems.[3]

It is axiomatic in the law that the validity of a statute must be determined in its overall context, giving due consideration to its operation and practical effect. The validity of a single, isolated provision cannot be determined *in vacuo*, ignoring its relationship to other parts of the same act and to related legislation.

Appellees would urge their own narrowly channeled vision on the Court by focusing on a single sentence in a complex legislative enactment. They would mask the equalizing bene-

[2] Article IX, Section 1, Constitution of Florida.

[3] Chapter 68-18, Laws of Florida.

fits that were produced by the self-same legislative act of which they complain, thus creating a misleading impression of the effect of the provision under attack in the overall context of Florida school financing legislation.

Appellees go to elaborate length to explore discrimination in theory. For reasons of their own, they do not speak to the question of whether Florida in fact discriminates against the school children in its property poor counties.

II.

SECTION 236.251, FLORIDA STATUTES, CONSIDERED IN ITS ENTIRETY AND IN CONTEXT WITH OTHER PROVISIONS OF THE MINIMUM FOUNDATION PROGRAM, HAD THE EFFECT OF DIMINISHING EXISTING INEQUALITIES IN EDUCATIONAL FUNDING AMONG FLORIDA COUNTIES.

In quoting the statute under attack, Appellees decline to go the extra mile, so to speak. They fail to point out to the Court that the next sentence in the enactment guarantees to every county an increase in total funds of at least $1,000.00 per instructional unit.[4] They assert that "measured by the reduction in millage from the year preceding the enactment of the Millage Rollback Act [1967-1968] the loss [sustained by counties whose millage was reduced] was well in excess of $50,000,000."[5] This statement creates the impression that the amount of school funds available to the various counties was actually reduced by this legislation.

The table presented by appellees purports to show the "approximate dollar reduction" suffered by each of the listed

[4] Section 23 of Chapter 68-18, Laws of Florida.

[5] Appellees' Brief, page 12.

counties.[6] Again, the impression meant to be conveyed is that the overall effect of the legislative formula of which Section 236.251, Florida Statutes, was a part, was to deprive poor counties of educational funds.

The net effect of the 1968 educational financing enactments was not only to make up for the loss of funds suffered by the counties required to reduce local millage but to greatly increase the moneys available to the counties on a per pupil basis.

The following table shows the actual overall effect of the 1968 legislation on the same counties listed by Appellees on page 13 of their brief.

	*Total Expenditures 1967-68**	*Total Expenditures 1968-69**	*Net Increase Total Funds 1968-69 over 1967-68*
Alachua	$498	$615	$ 2,690,638
Brevard	553	602	3,729,572
Broward	569	709	16,954,327
Collier	687	860	1,504,746
Columbia	523	679	1,011,862
Dade	669	748	29,156,301
Dixie	620	759	235,123
Duval	496	576	9,430,175
Escambia	476	576	4,690,773
Gadsden	440	589	1,533,917
Gulf	562	720	435,167
Hernando	603	721	458,123
Hillsborough	532	604	7,977,144
Leon	528	683	3,155,677
Manatee	587	721	2,280,876
Nassau	494	633	907,646

*Figures expressed in dollars per pupil.

[6] Appellees' Brief, Page 13.

	Total Expenditures 1967-68	*Total Expenditures 1968-69*	*Net Increase Total Funds 1968-69 over 1967-68*
Orange	$515	$628	$9,403,838
Pasco	501	582	1,123,136
Pinellas	615	695	8,163,152
Putnam	524	638	1,280,610
Seminole	461	572	2,102,749
Taylor	569	697	551,018
Volusia	569	661	3,356,176
Walton	514	635	393,679
State Average	564	673	
		TOTAL	$112,526,425[7]

Instead of a decrease of in excess of $50,000,000.00 as asserted by appellees, the amount available to the counties listed on page 13 of Appellees' brief was actually increased by more than $112,000,000.00 over and above that amount asserted by appellees to have been lost by virtue of the Millage Rollback Act. In the case of many of the counties listed, the increase of the total funds available per child was more than 25%, and in terms of millage equivalent, the amount gained was much greater than the amount shown by appellees as having been lost.

For example, Gadsden County is shown as having been required to decrease its millage by 5.05 mills and as suffering an approximate dollar reduction of $343,313.00. Although Gadsden County's millage was reduced, the net effect of the legislation was to increase its available funds to the point where its total expenditure per child was increased by more than 30%. This is the amount that would have been raised by an increase of 21.4 mills over the millage previously levied in

[7] The dollar amounts shown in column three were provided by the State of Florida, Department of Education.

Gadsden County. Thus, instead of losing funds, the counties listed by appellees in their brief gained vastly more funds than they could have raised by increasing their millages to impossibly high levels.

III.

THE MILLAGE ROLLBACK ACT RESULTED IN FURTHER EQUALIZATION IN 1970.

As legislative efforts to improve the financial structure of Florida's public schools are continuing in nature, the Florida Legislature again addressed itself to the problem during the 1970 Session.

A special *ad hoc* public school financing committee recommended that the state assume an even greater responsibility for public school financing. Its proposals were eventually enacted as the 1970 School Equalization Act.[8] This act recognized the state's primary responsibility for resolving the inter-related problems of providing adequate funding and equalizing support among school districts. It included a four-year plan for: (a) phasing an increased share of local property tax levies into equalizing state funding formulas, (b) improving the overall level of state support, and (c) enforcing fair assessment practices among the several school districts.

The School Equalization Act provided for immediate increases in the level of M. F. P. support. Beginning in 1970-71, the value of an instruction unit was raised $1,100.00 for each of the next four years.[9] Thus, under the Act, the average

[8] Chapter 70-94, Laws of Florida.

[9] Section 236.07(5), Florida Statutes, as amended by Chapter 70-94, Laws of Florida.

value of an instruction unit will rise from $9,700.00 in 1969-70 to $14,100.00 in 1973-74.[10]

The School Equalization Act placed an increasing proportion of local property taxes into the state funding formula, thus reducing the inequities in total support between districts. At the same time, increases in local effort were placed into school funding formulas on the basis of uniform property assessment standards as determined by an independent study. Moreover, protections were built into the law to minimize losses in wealthy districts at the same time resource allocations were substantially raised in property poor school districts. When taken in the context of a four-year mandate of improved support, this state funding formula will provide the degree of equalization sought by both appellants and appellees, equalization impossible to achieve solely through local property tax increases.

The overall effect of the 1970 School Equalization Act on the eight poorest counties in the state and the eight wealthiest ones is shown by the following tables:[11]

---

[10] This figure is obtained by adding $1,100 per annum to the present worth of the instruction unit, which worth is approximately $9,700.

[11] The estimated gain, loss and expenditure figures used in compiling this chart were furnished by the State of Florida, Department of Education.

Eight Poorest Counties in Assessed Value Per Pupil ADA

County	Adjusted Value of Mill per ADA	Estimated Gain in Expenditure per ADA	Estimated Expenditure per ADA	Value of Gain in Millage Equivalents
Gadsden	$ 8.21	$129	$752	15.7
Madison	11.85	53	734	4.5
Okaloosa	13.50	101	694	7.5
Holmes	14.01	58	784	4.1
Clay	15.09	48	643	3.2
Jefferson	15.21	53	778	3.4
Jackson	15.71	57	737	3.7
Bradford	16.11	108	849	6.7

Eight Wealthiest Counties in Assessed Values per Pupil ADA

County	Adjusted Value of Mill per ADA	Estimated Loss in 1970-71 per ADA	Estimated Expenditure per ADA	Value of Loss in Millage Equivalents
Glades	$89.69	24	$1,112	.3
Charlotte	87.36	63	806	.7
Collier	79.75	56	1,034	.5
Martin	60.84	34	718	.6
Sarasota	58.15	19	860	.3
Flagler	55.19	30	738	.5
Palm Beach	52.69	5	878	.1
Monroe	47.23	5	725	.1
State average	30.36		799	

The net effect of the Florida legislation, considered as a whole, including the Millage Rollback Act, has been to increase dramatically the proportion of school funds provided by the state and to greatly diminish the effect of inter-county inequities resulting from the differences in assessed values per pupil.

The Millage Rollback Act was one of the primary forces giving impetus to this trend. The tables above demonstrate the wide variations in property values from county to county, and, consequently, in the ability of the counties to raise school funds by levying property taxes. A 1 mill levy in Gadsden County produces $8.21; whereas a similar levy in Glades County produces $89.60. Therefore, reliance on the property tax is inherently disequalizing. Any encouragement of such reliance has a deterrent effect on ultimate equalization.

For purposes of illustration, suppose, as appellees suggest,[12] that Florida provided each child in average daily attendance in her schools with an equal number of dollars, say $400.00. Assume also, as appellees seek, no limit on the amount of millage a given county might impose upon its property owners. If each of Florida's eight poorest counties and each of its eight wealthiest counties increased its millage to 15 mills, the following inequities would result:

[12] Footnote 23, page 20, of Appellees' Brief. Also, see Appellees' Brief, page 44.

EIGHT POOREST COUNTIES

County	*Value of mill per pupil in ADA*	*State expenditure per pupil in ADA*	*Amount raised per pupil locally from 15 mill levy*	*Total expenditure per pupil*
Gadsden	$ 8.21	$400	$ 123	$ 523
Madison	11.85	400	177	577
Okaloosa	13.50	400	203	603
Holmes	14.01	400	210	610
Clay	15.09	400	225	625
Jefferson	15.21	400	228	628
Jackson	15.71	400	236	636
Bradford	16.11	400	242	642

EIGHT WEALTHIEST COUNTIES

Glades	$89.69	$400	$1,344	$1,744
Charlotte	87.36	400	1,310	1,710
Collier	79.75	400	1,196	1,596
Martin	60.84	400	912	1,312
Sarasota	58.15	400	872	1,272
Flagler	55.19	400	827	1,227
Palm Beach	52.69	400	789	1,189
Monroe	47.23	400	708	1,108

Thus, in terms of total funding, a plan such as appellees suggest would only compound and magnify the very inequalities Florida has been striving mightily to correct. To revert to the simplism with which appellees fault us, such a plan would provide Florida's richest county, Glades, with 333% more money with which to educate each pupil than that available in Florida's poorest county, Gadsden.

The effect of the Millage Rollback Act has been to reduce these wide variations. For 1970-71, 52 out of the 67 Florida

counties are levying 10 mills or slightly more.[13] Only four counties are levying less than 8 mills.

With the great majority of the counties at the millage ceiling, all of them must look to state sources for additional funds. This would not be the case without the ceiling. If the Millage Rollback Act did not exist, wealthy counties could gain substantial additional funds from small additional local property levies and they would have no incentive to press for additional state funding. The disequalizing effect which this would have is demonstrated by the chart above.

The purely formalistic equality ordered by the judgment of the court below fails to take into account the wisdom of Mr. Justice Frankfurter's observation in *Dennis v. U.S.*, 399 U.S. 162, 184, that "... there is no greater inequality than the equal treatment of unequals." Invalidating the Rollback Act in the name of equality is reminiscent of the observation by Anatole France that, "the law in its majestic equality forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread."

IV.

THE PROBLEM OF MEASURING EQUALITY AND ECONOMIC EDUCATIONAL OPPORTUNITY IS TOO COMPLEX TO PERMIT A SINGLE FACET OF THE PROBLEM TO BE VIEWED IN ISOLATION.

School finance is a highly complex subject. Its revenue raising aspects require a delicate balancing of educational needs with other facets of public policy. The dis-equalizing effects of relying on local revenues have already been demonstrated. There are other problems as well.

[13] Figures supplied by the State of Florida, Department of Education.

Use of state funds has an equalizing effect. But state revenues must be raised before they can be distributed. There is often delay between the time when need for additional state funds is recognized and a new source of revenue is found. The problems of selecting a revenue source at the state level are complex. What taxes should be used to raise revenue and what proportion should be contributed by each?

Until it becomes practical to effect a more complex program of equalization such as the "power equalizer" plan advocated by Messrs. Coons, Clune and Sugarman,[14] some balance must be achieved in the proportion of state and local revenues used to finance schools. This balance must be worked out by legislative action. In discussing possible judicial remedies for discrimination based on wealth, they make the following observations (p. 293):

"The second problem of preemption is that of excessive limitation by the court of legislative alternatives. How far should the court specify forms of legislation that do satisfy the Constitution? Some partisans in school finance cases urge prescription in detail of the very form and structure of school finance for the states. That hope is probably vain; if not, it is merely horrifying. **Perhaps the worst service the court could render would be the enunciation of a principle that would leave the state no flexibility in its choice of financial structure for education.** For example, requiring equality of expenditures per pupil statewide might be a catchy device for terminating the existing injustices; it might also be an effective way to terminate public education. There is certainly no question that such a solution could pretermit forever the

[14] Coons, Clune and Sugarman, *Private Wealth and Public Education*, (Harvard University Press, 1970).

possibility of legislative re-examination of a host of alternatives to the rejected order of things. There is great virtue in the court's confining itself whenever possible to minimal proscriptions in the interest of legislative flexibility . . . . (Emphasis added)

"In summary, the best service the court can perform is four-fold: (1) break the logjam of the status quo and thus free the state from a politically immovable system; (2) give the state wide latitude in its re-examination of the finance problem; (3) speak with clarity in a standard capable of intelligent interpretation; (4) remain keenly sensitive to the likely legislative and popular responses to the various forms its decisions and orders might take. We happily endorse the monition of Phillip Kurland: 'Let's place the responsibility where it belongs. Let's permit the state an opportunity to experiment with different answers to these difficult problems and free them to undertake the experiment.' "

If Florida school financing arrangements are to be measured against the proscriptions of the Fourteenth Amendment, they should be viewed in their overall context in a proceding which directly raises the question of whether a state is, in fact, discriminating against its citizens by making the quality of education a function of wealth. (See Coons, Clune, and Sugarman at p. 304).

The question of whether the Fourteenth Amendment has been violated cannot be determined formalistically by viewing out of context a single aspect of the broad picture of Florida school finance. The judgment of the court below has invalidated, on purely theoretical grounds, an integral part of Florida's school finance program. In so doing, it has turned the blade inward and used the Fourteenth Amendment to frustrate attempts by the Florida Legislature to promote state-wide equality in education.

We would respectfully urge upon the court that it permit us to retain our flexibility as we cast about to find solutions to the problem of financing public education in Florida. Given the freedom to explore alternatives, we shall continue to press on toward the goal both we and appellees seek for Florida children—an equal economic educational opportunity.

CONCLUSION

For the reasons contained herein and in Brief of Appellants, this Court should reverse the judgment below.

Respectfully submitted,

RIVERS BUFORD, JR.
General Counesl
State Board of Education
347 Miles Johnson Building
Tallahassee, Florida 32304

STEPHEN MARC SLEPIN
Counsel
State Board of Education
347 Miles Johnson Building
Tallahassee, Florida 32304

CHARLES E. MINER, JR.
Counsel
State Board of Education
347 Miles Johnson Building
Tallahassee, Florida 32304

ASKEW, GOVERNOR OF FLORIDA, ET AL. *v.* HARGRAVE ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

No. 573. Argued February 23-24, 1971—Decided March 8, 1971

Appellees brought this suit in federal court challenging Florida's Millage Rollback Law as violative of the Equal Protection Clause of the Fourteenth Amendment on the ground that it had an invidiously discriminatory effect in its distribution of taxing authority for educational purposes by a standard related solely to a county's wealth. Appellants contended that the statute was only part of a total plan more nearly to equalize schoolchildren's educational opportunities on a statewide basis. A three-judge District Court granted appellees' motion for summary judgment on the basis of the pleadings and appellees' affidavit, having rejected appellants' argument that the District Court should abstain from considering the case because of an intervening state court proceeding attacking the law on state constitutional grounds. *Held:*

1. The District Court mistakenly relied upon *Monroe* v. *Pape*, 365 U. S. 167, and *McNeese* v. *Board of Education*, 373 U. S. 668, in refusing to abstain from deciding the case on the merits pending resolution by the state courts of state constitutional claims, the sustainment of which would obviate the need for determining the Fourteenth Amendment issue. *Reetz* v. *Bozanich*, 397 U. S. 82, is an example of the line of decisions that should inform the discretion of the District Court in determining whether to abstain.

2. Since the manner in which Florida's overall program operates may be critical in resolving the equal protection claim, that claim should be decided not by summary judgment but after a full hearing.

313 F. Supp. 944, vacated and remanded.

Charles E. Miner, Jr., argued the cause for appellants. With him on the briefs were *Rivers Buford, Jr.*, and *Stephen Marc Slepin*.

Hershel Shanks argued the cause for appellees. With him on the brief were *Allan I. Mendelsohn*, *Robert M. Perce, Jr.*, *Richard H. Frank*, and *David Rubin*.

William H. Adams III filed a brief for the Florida Education Research Foundation as *amicus curiae* urging reversal.

PER CURIAM.

In 1968, Florida enacted a new law for the financing of public education through state appropriations and local *ad valorem* taxes assessed by each school district. A section of the new law, Fla. Stat. Ann. § 236.251 (Supp. 1970), know as the "Millage Rollback Law," provided that, to be eligible to receive state moneys, a local school district must limit *ad valorem* taxes for school purposes to not more than 10 mills of assessed valuation, with certain exceptions. Appellees filed this class action in the District Court for the Middle District of Florida alleging that the Millage Rollback Law effected an invidious discrimination, in violation of the Equal Protection Clause, against school children of property-poor counties in that 10 mills of *ad valorem* tax in school districts in such counties would produce less dollars per child for educational purposes than would 10 mills of *ad valorem* tax in other counties. A three-judge District Court entered a summary judgment in appellees' favor upon a declaration that the Millage Rollback Law was unconstitutional, and enjoined the appellants from withholding state funds from any school district by virtue of the provisions of that Act. *Hargrave* v. *Kirk*, 313 F. Supp. 944 (1970). We noted probable jurisdiction. 400 U. S. 900 (1970). We vacate and remand.

I

Subsequent to the filing of this suit, *School Board of Broward County* v. *Christian*, No. 69-932, was filed in the Circuit Court of the Second Judicial Circuit of Leon County, Florida. That action attacks the Millage Rollback Law primarily on state law grounds, as violative of

provisions of the Florida Constitution. The District Court, however, rejected appellants' argument that the court "should abstain from considering the case in deference to [the] state court proceeding," 313 F. Supp., at 946–947, holding that under *Monroe* v. *Pape*, 365 U. S. 167 (1961), and *McNeese* v. *Board of Education*, 373 U. S. 668 (1963), "[t]he fact that a state remedy is available is not a valid basis for federal court abstention." 313 F. Supp., at 947. The reliance upon *Monroe* v. *Pape* and *McNeese* was misplaced. *Monroe* v. *Pape* is not in point; for there "the state remedy, though adequate in theory, was not available in practice." 365 U. S., at 174. *McNeese* held that "assertion of a federal claim in a federal court [need not] await an attempt to vindicate *the same claim* in a state court." 373 U. S., at 672 (emphasis added). See also *Wisconsin* v. *Constantineau*, 400 U. S. 433 (1971). Our understanding from the colloquy on oral argument with counsel for the parties is that the *Christian* case asserts, not the "same claim," that is, the federal claim of alleged denial of the federal right of equal protection, but primarily state law claims under the Florida Constitution, which claims, if sustained, will obviate the necessity of determining the Fourteenth Amendment question. In such case, the line of decisions of which *Reetz* v. *Bozanich*, 397 U. S. 82 (1970), is a recent example, states the principles which should inform the exercise of the District Court's discretion as to whether to abstain.

II

Since the case must be remanded, we add another comment. The appellees' motion for summary judgment was considered on the pleadings and an affidavit which essentially merely verified the allegations of the amended complaint. Our examination of the pleadings and the affidavit persuades us that they are inadequate as a basis for deciding the equal protection claim. They do

not sufficiently present the facts related to appellants' argument that the Millage Rollback Law was only one aspect of a comprehensive legislative program for reorganizing educational financing throughout the State to more nearly equalize educational opportunities for all the school children of the State. Appellants contend that this program enacted a formula calling for "a massive infusion of state money into the several school districts," which more than made up the loss suffered by a school district under the limitation of 10 mills in the assessment of *ad valorem* taxes: "The net effect of the 1968 educational financing enactments was not only to make up for the loss of funds suffered by the counties required to reduce local millage but to greatly increase the moneys available to the counties on a per pupil basis." Appellants' Reply Brief 4. Since the manner in which the program operates may be critical in the decision of the equal protection claim, that claim should not be decided without fully developing the factual record at a hearing.

The judgment of the District Court is vacated and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE BLACK concurs in the judgment and Part II of the opinion.